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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. 789-791

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit,
MOTION RE TRANSCRIPT OF RECORD,
and
BRIEF IN SUPPORT OF PETITION.

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INDEX.

PETITION FOR WRITS OF CERTIORARI 1

A. Summary Statement of the Matter Involved..... 1

Jurisdiction 12

Questions Presented 12

B. Reasons Relied on for Allowance of the Writ..... 16

MOTION FOR LEAVE TO PROCEED HEREIN ON TYPEWRITTEN TRANSCRIPT OF RECORD AND OF THE TESTIMONY AND EVIDENCE ADDUCED IN TRIAL COURT AND OF THE RECORD OF CIRCUIT COURT OF APPEALS AS FILED HEREIN 23

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 25

Opinions of the Court Below..... 25

Jurisdiction 25

Statement of the Case..... 26

Assignment of Errors..... 26

Argument 29

I. The Principles of Law Involved Herein Are Very Important to the General Public and Especially to Those Who Are Accused of a Crime and Brought to Trial in a Court of Law. Article VI, Amendments to U. S. Constitution, Guarantee Accused a Speedy Trial. Accused Were Denied a Speedy Trial 29

II. The Presumption of Innocence Lies at the Foundation of Our Criminal Law. The United States Supreme Court Uttered that Statement. The Enforcement of the Principle in a Criminal Case 34

III. Circuit Court of Appeals Relied on Fact Appellants Participated in Securing Applications—for Raising Money for Development of Cemeteries.. 56

143948

IV. The Admission of Written Documents—Prejudicial. No Witness on Stand. Violation 6th Amendment 59

V. The Exclusion of Testimony by the Trial Court Offered by Defendant—Material to Issue Good Faith 63

VI. The Motion and Affidavit for New Trial—Based on Extraneous Matter Considered by Jury Prejudicial to Appellants..... 67

VII. The Trial Court Denied Permission to Appellants Cross Examine Marshall..... 68

APPENDICES:

A. Opinion of the United States Circu Court of Appeals 70

B. Judgment in Docket No. 9241, Blue, et al. v. U. S. 91

C. Judgment in Docket No. 9242, Clark, et al. v. U. S. 91

D. Judgment in Docket No. 9243, Pardee, et al. v. U. S. 92

E. Order Denying Petitions for Rehearing, Docket Nos. 9241, 9242 and 9243..... 93

F. Constitutional and Statutory Provisions:

A. Pertinent Provisions of the United States Constitution 95

B. Acts of Congress..... 96

C. Sections of the General Code of Ohio..... 97

TABLE OF AUTHORITIES.

Cases.

Bebardi vs. U. S., 287 U. S. 112.....15, 58

Coffin vs. U. S., 156 U. S. 434 .....15, 17, 36, 38

Crawford vs. U. S., 212 U. S. 183..... 14

Dalton vs. U. S., 154 Fed. 461 39
De Bonaventura vs. U. S., 15 Fed. 2nd, 494.....15, 58
Derry's Lessee vs. Gray, 5 Wall. 795.....14, 64
Dickerson vs. U. S., 18 Fed. 2nd (8th Cir.) 887.....15, 58
Dunlap vs. U. S., 165 U. S. 486 38
Durland vs. U. S., 161 U. S. 306 .....17, 51, 53, 54
Fain vs. U. S., 209 Fed. 525 54
Falcone vs. U. S., 311 U. S. 205.....15, 51, 57, 58
Farrar vs. Churchill, 135 U. S. 583 39
Fontana vs. U. S., 262 Fed. 283 .....51, 52
Gregg vs. Lessee Sayre, 8 Peters 39
Hammer vs. U. S., 134 Fed. 2nd (5th Cir.) 594 58
Joplin vs. U. S., 236 U. S. 58
Kirby vs. U. S., 174 U. S. 47 .....15, 16, 37, 49
Lessee Tinker vs. Moorland, 10 Peters 58 39
Lilienthals Tobacco Co. vs. U. S., 97 U. S. 237 .....36, 37
Linde vs. U. S., 13 Fed. 2nd, 59 .....15, 58
Manning vs. Mutual Life Insurance Co., 100 U. S. 693 .....44, 45, 58
Mattox vs. U. S., 146 U. S. 140, 36 L. Ed. 920.....12, 67
Mattox vs. U. S., 156 U. S. 237 16
McKelvey vs. U. S., 241 Fed. (C. C. A.) 801 58
Motes vs. U. S., 178 U. S. 458 16
Pelz vs. U. S., 54 Fed. 2nd 1001 58
Pettibone vs. U. S., 148 U. S. 197 51
Reg. vs. Boulton, 12 Cox Cr. L. C. p. 87, Court Queens Bench 60
School vs. McAnnulty, 187 U. S. 107 45
Sullivan vs. U. S., 283 Fed. 865 (8th Cir.) 17

Swift & Co. vs. U. S., 196 U. S. 375 58
U. S. vs. Arredando, 6 Peters, 691 39
U. S. vs. Beggs, 211 U. S. 507 54
U. S. vs. Britton, 108 U. S. 199 58
U. S. vs. Falcone, 109 Fed. 2nd, 579.....15, 51, 57, 58
U. S. vs. Newton, 52 Fed. 275 58
U. S. vs. Ross, 92 U. S. 281 17
U. S. Santabrey vs. Moore, 10 Fed. 2nd 657 58
U. S. v. Wilkinson, 12 How. (U. S.) 246..... 14
U. S. vs. Young, 232 U. S. 155 58
Van Tess vs. U. S., 292 Fed. 513 (Ohio) 48, 58
Vernon vs. U. S. (8 C. C. A.), 146 Fed. 121.....15, 58
Vicksburg vs. O'Brien, 119 U. S. 99..... 14
Wolf vs. U. S., 238 Fed. (4th Cir.) 902.....36, 38, 51

Texts.

31 *C. J.* Sec. 255, p. 1006, Sec. 257, p. 1010 64
31 *C. J. Sec.* p. 1003, Sec. 252..... 64
Wharton Cr. Ev. 11th Ed. Vol. 1, Sec. 485; Sec. 96, p. 116 64
Wigmore Ev. Vol. 6, Sec. 1789, Sec. 1790, p. 239, Vol. 6 64

Statutes.

Cr. Code 332, Sect. 550..... 97
18 U. S. C. A. 88.....3, 14, 15, 96
18 U. S. C. A. 338.....3, 14, 15, 65, 96
28 U. S. C. A. 347-A (Judicial Code Section 240).....12, 25
28 U. S. C. A. 723A..... 67
General Code of Ohio:
Section 5350 97
Section 13104 .....64, 65

Constitution.

Constitution of the United States:

Article I, Section 10 95

Amendment V 14, 95

Amendment VI 7, 13, 14, 26, 34, 56, 59, 95

Amendment VIII 95

Amendment XIV 96

Rules.

Rules of Practice, U. S. Supreme Court:

Rule XI 12

Rule 11-(3) 67

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E. G. BLUE, *et al.*,
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EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, E. G. Blue, William N. Clark, Willard S. Holcombe, Dan S. Riggle, Byron L. McClure, Carl A. Bemman, George F. Buck, Earl Pardee, George E. Reinwald, W. Hal Marshall, A. L. Malott, Earl L. Holliday, S. F. Neidigh, R. C. Deck and Hiram Berry respectfully show as grounds for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners, all salesmen, were licensed as Cemetery salesmen by the State of Ohio, to sell cemetery sections, in the cemeteries hereinafter named. They sold the sections through Forest Glen, Inc., a corporation formed by Robert Marshall as a development and sales organization. They

were not stockholders, officers or directors of Forest Glen, Inc., and had nothing to do with the bookkeeping, etc. Forest Glen, Inc. made a contract with each of the cemeteries herein named (Gov't. Exs. 5228-5230 Incl., pp. 3153-3156 Transcript), through the Trustees of each cemetery, that it would convey or cause to be conveyed, land to each cemetery, free and clear, provided, Forest Glen, Inc. would have the right to build and develop each of such cemeteries and sell sections in such cemeteries for the purpose of securing money for development purposes. Out of the proceeds of such sales, 10% was to be given each cemetery as a perpetual care fund. This was done. The other 90% was to belong to Forest Glen, Inc. Out of that 90% was to be paid the cost of development, advertising, salesmen commissions, payments to investors and all other expenses. When the cemeteries were completely built and paid for, then the cemeteries were to become the absolute property of lot owners—held for them by the Trustees. Forest Glen Inc. had agreed to maintain a sales organization known as wholesale and retail, until such cemeteries were paid for and completely developed. *The deeds from all sections whether made at retail or wholesale, provided that the sections could be used only for the burial of the dead.* When the Marion cemetery, known as Forest Glen, was organized in 1933, the record discloses there was no thought or intention of developing any other cemetery in July 1933, after Marion was completed. (pp. 3458, 4799, 4800 R., Transcript.) Springfield, Ohio cemetery was then planned and developed, known as Glen Haven. That was in 1934. In 1936 a similar cemetery was planned and developed near Columbus, Ohio, known as Glen Rest. All such cemeteries were known as Memorial Parks, equipped with Chapel and community meeting house, fine pipe organ, a tower with chimes, operated from the pipe organ and lakes, trees, fountains, foliage, drive-ways and head-markers only. Each cemetery was substantially com-

pleted and developed. The contracts, noted above, of Forest Glen, Inc. with each cemetery, were all legal contracts, their legality never having been questioned or successfully attacked.

In November 1940, an indictment was returned against Robert Marshall and the attorney, and the auditor for Forest Glen, Inc. and for the cemeteries, and 41 salesmen, including appellants.

The first nine counts set forth an alleged scheme to defraud was formed by all of the defendants July 1, 1933 (p. H Transcript opening statement Dist. Atty.), and use of mails. (Sec. 338, Title 18, U. S. C. A.) The tenth count alleged all of the defendants formed a conspiracy July 1, 1933, to use the mails to carry such scheme into effect. (Sec. 88, Title 18, U. S. C. A.)

To that indictment, Motions for Bills of Particulars, Motions for separate trials and Demurrers were filed by each appellant. Motions were made at the end of the Government's case and at close of all the testimony to dismiss the defendants and each of them and direct a verdict of acquittal. The jurisdiction of the Court under the indictment was questioned at the outset of the trial. (p. A-14, Transcript.)

The District Court overruled and denied all of these pleadings and Motions. The trial began September 23, 1941, and was concluded April 7, 1942, when a verdict was returned. The trial actually ended on April 1, 1942, the jury deliberated for six days.

Marshall, the Attorney and all salesmen were convicted. The Auditor was acquitted. Immediately after conviction the Court stated "he would consider a Motion for a New Trial filed by each defendant and that the same was overruled," no opportunity being offered to submit anything in support thereof. Having appealed to the United States Circuit Court of Appeals for the Sixth Circuit in Causes Nos. 9241, 9242 and 9243, the judgments of

conviction as to them were affirmed and their Petitions for Rehearing in the Circuit Court were denied on February 9, 1944.

The evidence relied upon for conviction, with some individual exceptions, all related to selling cemetery sections according to applications—plans—terms—agreements and instructions as devised by Marshall and issued by the managing officers and employers of appellants, as stated by the Government in its opening statement to the Jury. (p. K. Transcript.) The Court of Appeals found and the evidence showed that Robert Marshall devised, originated and executed whatever plans and schemes existed with reference to the establishment, procuring of lands, incorporation of companies, development and financing of the enterprises. He caused Forest Glen, Inc. to be organized. Forest Glen, Inc. was the sales organization through which Marshall held title to the land developed into cemeteries.

An opinion of the Attorney General of Ohio (p. 3420 Transcript Def. Ex. 1103) had previously held that such a contract as existed between Forest Glen, Inc. and the cemeteries, between a sales organization and the Trustees of a cemetery was legal. The salesmen were licensed under an opinion of the Attorney General of Ohio (Def. Exh. 1246, pp. 4625-4626 Transcript) to sell the sections in these cemeteries as real estate and during the period of the development of the Parks and the sale of sections, the entire enterprise, the contracts and methods of financial operation were investigated by the Securities Division of the State of Ohio and the stamp of approval of that Department was placed upon them. The Trustees who served on the Boards of Trustees of the three Memorial Parks and of the sales organizations were reputable, outstanding men in the communities in which the Parks were located and naturally inspired confidence in the public and salesmen. They were in control of the Parks after the alleged plans and scheme were alleged to have been devised by Marshall and during the

entire period of time covered by the Government's charge of mail fraud and conspiracy. Only one of these men was indicted, viz., the attorney for the enterprise, who was convicted, and given a sentence which was suspended upon the payment by him of a $5,000.00 fine. These Trustees took control of the plans and development before the salesmen were called in and employed. Robert Marshall was the man behind the promotion, development and management of the entire undertaking. He conceived the idea of building the Parks and devised the methods for raising the money to finance their development. He controlled the brokers and the salesmen. Everything was done under his supervision. The salesmen admittedly had nothing to do with the control or operation of the business, the forming of the plans, the books, financing, banking or correspondence of the corporations or management.

During the period of time from November 1933 to May 16, 1938, $424,365.59 was spent in the development of the three beautiful cemeteries. Sections were sold and money was borrowed by Forest Glen, Inc., not the cemeteries for investment purposes to develop the cemetery, aggregating $1,840,582.21. A large force of retail salesmen was organized. Sections were sold at retail, aggregating the sum of $1,332,880.66 (p. 2570 Transcript). Forest Glen, Inc. owed the investors, etc. $1,036,432 in May 1938—at time receivership was sought according to Circuit Court of Appeals decision. It was out of the sales of sections at retail by which it was intended and agreed to repay the wholesale investors and lenders according to the contracts made with them. $344,586.00 (pp. 2487, 2735 Transcript) of this amount had been paid in by May 18, 1938, at which time there was due Forest Glen, Inc. on retail sales $659,000.00. $132,043.92 was paid into the Endowment Funds. In addition there was paid salesmen commissions and operating and advertising expense amounting to several hundred thousand dollars.

14000 sections (p. 2569 Transcript) were sold at retail for purpose of paying purchasers of sections at wholesale and borrowings. All of the foregoing was a part of the Government's case as testified by their expert auditor O'Brien. All these sections were sold in four and one-half years. 33000 sections remained to be sold for the benefit of the cemeteries.

During this period of time investors were paid the sum of $803,950.73. Part of this money represented money borrowed. The salesmen defendants were paid only on a commission basis of 15% of sales.

Litigation was commenced against Robert Marshall by a lone investor—seeking a receivership in the first part of 1938 resulting in his being divested of any control over the Parks on May 16, 1938. There were no widespread complaints made. The three Memorial Parks remain in existence today, serving the useful purposes for which they were developed. As the indebtedness to creditors other than investors and lenders is relatively small the investors all have valuable constructive holdings in these Parks. The Sections were selling at the time of the trial for $125.00 to $500.00 for burial purposes merely. Sections at wholesale sold for $50.00.

At the trial the Court refused to admit evidence offered by various appellants material to the issues raised by the indictment and plea of not guilty. The trial court refused to permit the testimony of the Prosecuting Attorney of Franklin County (pp. 4542, 4555, 4560, 4573, Transcript), that upon complaint made to him he had investigated this same cemetery project and that he had told Holcombe and one other salesman who questioned him before they became salesmen, that he had investigated the matter, found it legal and nothing wrong, all going to the issue of good faith and criminal intent. The record fails to show affirmatively that such appellants were not prejudiced thereby.

At the trial the Court admitted testimony, over objection, which was immaterial, and which obviously was irrelevant and prejudicial. The record does not show affirmatively that appellants were not prejudiced thereby.

At the trial, the Court admitted documentary evidence against appellants which it was contended by the Government was material, and which was prejudicial to some of the appellants, when no witness was on the stand, in violation of Article VI of the Amendments to the United States Constitution. (pp. 3353, 4089 Transcript—Government Exhibits 967-C and 957A to V, pp. 2816, 2827, 2831, Transcript affecting Holcombe.)

One of appellants, W. N. Clark, invested $30,000.00 in sections at wholesale. Other salesmen and their families invested thousands of dollars in sections—all on the same terms as given other investors.

The decision of the Court of Appeals discloses that it relied upon the testimony of Robert Marshall in his own defense to establish *his* scheme to defraud and *his* conspiracy. (pp. 4114, 4121, 4118, 4119, Transcript.) This was after the Government had failed to establish all this on its own case and after Motions and Demurrers were made and filed for a directed verdict before the case ended for failing to do this (pp. 2248A to 2248D, Transcript), and the Motion and Demurrer of Record at the close of the Government's case, upon the same grounds. All were denied. The Court stating that the evidence must be considered most favorable to the Government, even though consistent with innocence. This was fundamental error.

The following petitioners were convicted, with others, not appealing, on all ten counts. Their sentences are set opposite their names.

Name	*Count*	*Sentence*	*Fine*
Wm. N. Clark	10	5 years	$1000.00
Dan S. Riggle	10	3 "	1000.00
Willard S. Holcombe	10	3 "	1000.00
Earl Pardee	10	3 "	1000.00
G. F. Buck	10	3 "	1000.00
Carl Bemman	10	3 "	1000.00
George Reinwald	10	6 "	1000.00
Earl L. Holliday	10	5 "	1000.00
R. C. Deck	10	4 "	1000.00
A. L. Mallott	10	3 "	1000.00
W. Hal Marshall	10	3 "	1000.00

The following petitioners, with others not appealing, were convicted on the first count only and acquitted on the other 9 counts, including the 10th count known as the conspiracy count.

Name	*Count*	*Sentence*	*Fine*
Byron L. McClure	1	1 year and a day	$1000.00
~~Paul Secord~~	~~1~~	~~1 year and a day~~	~~1000.00~~
S. C. Neidigh	1	1 year and a day	1000.00
Hiram Berry	1	1 year, 18 months	1000.00
E. G. Blue	1	1 year, 18 months	1000.00

A number of salesmen, five, were acquitted on all counts except the first. Their convictions were reversed by the Circuit Court of Appeals. However, they sold on the same terms and did substantially the same things as those salesmen did, who were convicted on all ten counts. The alleged chief offenders, as claimed by the Government in the indictment and at the trial and in its opening statement to the jury, were convicted on all ten counts. Their sentences, except Marshall who died before sentence, and whose death was forecast by his doctors at the start of the trial, if he had to proceed (pp. 8, 14 A, 9-B-14B, 31 Transcript), were suspended on the payment of heavy fines.

The Court of Appeals did not segregate the salesmen and specify the circumstances evidencing their individual guilt regardless of the presumption of innocence but said

"some were guilty of one type of conduct, some of another; Marshall may have imposed on some of the salesmen and some may have acted in good faith."

Yet—affirmed the conviction of all appellants, notwithstanding they may have acted in good faith.

The errors upon which your Petitioners claim to be entitled to a reversal are set out in the assignment of errors set forth in the Brief filed herein.

The Court of Appeals in its Decision said:

> "As charged by the Government the fraud consisted of a scheme in which cemetery lots were sold to the public for purposes of investment." 138 Fed. 2nd 351-353.
>
> "The conspiracy consisted of a scheme to defraud people in the sale of cemetery lots." 138 Fed. 2nd 360.

The District Court (p. 5332, Transcript) *charged the jury that the sales of the sections by appellant salesmen was not in and of itself illegal and that the execution of the applications, contracts, deeds evidencing the right to use such sections for the burial of the dead, was not illegal.*

The Government did not state in the indictment that such sales and papers were illegal, neither did they make any such claim at the trial. They said the sales of sections for investment and resale for utility to pay a profit to investors was not unlawful. (p. 4368, Transcript.)

The Circuit Court of Appeals relied upon the testimony of Marshall to establish what it conceived to be the scheme to defraud and affirm the conviction of appellants. This action was prejudicial to appellants under the demurrers and motions filed at end of Government's case for a directed verdict. The Trial Court in effect held appellants, who did not call Marshall, could not cross examine him and were bound by his testimony. This was prejudicial error. (pp. 4114-4119, Transcript.) (See 138 Fed. 2nd, pp. 358, 361 also.)

It was admitted and conceded by the Government and the Court below, that the case, as against the appellant salesmen, rested solely on circumstantial evidence and that their only compensation was their commission.

The District Court admitted, that circumstances which the Government maintained was material and which were relied upon by the jury and the appellate court—were susceptible of an inference of innocence. (p. 2821, Transcript.)

Both the District Court, over the objection of appellants, and the Court of Appeals said that notwithstanding such circumstances were susceptible of an inference of innocence, that the same must be submitted to the jury, that it was not a question of law for the Court—requiring a verdict of acquittal. (pp. 1823-24, Transcript.)

The District Court charged the jury, however, that where a circumstance was susceptible of an inference of innocence, *the jury must resolve* (pp. 5308-5311 Transcript) the inference in favor of innocence and not guilt, but left the question to the jury.

During the trial a persistent effort was made by one of the appellants, pp. A-16, 17, 18-4359, 4365, 4799, 1714, 4367, pp. 1822, 4966, 4968, which the trial court said would run in favor of all defendants, to compel the Government to state what the alleged scheme to defraud was, i.e., whether they claimed that the sales and papers themselves were illegal under Ohio law or whether the illegality and fraud consisted in something else, some other facts not alleged. The Court refused to compel the Government to so state and appellants never knew, what exactly it was, with which they were charged as the basis of the alleged scheme to defraud and the alleged conspiracy until the Circuit Court of Appeals defined it as set out herein.

In the Court of Appeals, the Government, after being asked by the Court of Appeals, what the scheme to defraud was and what the conspiracy was, said, in their reply brief, p. 2,

*"We have experienced the inevitable difficulty of * * * summarizing the evidence or adequately describing the scheme to defraud—as it affected the individual appellants."*

*"These practical difficulties * * * result from the fact that* **the scheme** *and the evidence thereof* **are spread over five thousand odd pages of the record** *and* **several thousand exhibits."**

The Government and the Court of Appeals relied solely on what the salesmen did as salesmen in securing applications and making such sales and as substantially incorporated in the documents which the District Court charged the Jury were not unlawful, to establish knowledge and an agreement to enter the scheme and agreement to enter such alleged conspiracy.

The Court of Appeals did not find that Marshall conspired with anyone, either as to said alleged scheme or as to the intent to use the mails to carry out such alleged scheme. The Court found that Marshall alone devised the scheme as the Court defined it, and then that it became a conspiracy because the salesmen sold under the applications, contracts, deeds and plans promulgated by him and by Forest Glen, Inc., which corporation the Court of Appeals said, "Marshall caused to be incorporated," none of the salesmen were in any wise interested or a part of that corporation, or any other corporation which Marshall caused to be formed.

The District Court charged the jury that they were not permitted to discuss the fact the defendants did not take the stand. An affidavit was filed in the Circuit Court of Appeals and after appeal, a motion for a New Trial was filed in the Circuit Court of Appeals, under Rule, based upon the fact alleged that the jurors spent a day or more discussing the fact that defendants did not take the stand, that therefore, they must all be crooks and further stating that the trial cost about $500,000.00 and that they would not dare bring in a verdict of acquittal. The Court

of Appeals did not categorically pass upon that Motion and Affidavit. (*Mattox vs. U. S.* 146 U. S. 140, 36 L. Ed. pp. 920, 921.)

The Government admitted that the books showed that Forest Glen, Inc. intended to continue to operate as a going concern, and to sell sections for utility purposes. (p. 3306, Transcript.)

The trial court ruled in passing on the motions and demurrer at the end of the Government's case, that the circumstances and evidence must be given the most favorable construction in favor of the Government. The effect of that ruling was to upset, neutralize and nullify the presumption of innocence. The Court made this ruling after conceding that some of the circumstances relied on for conviction are consistent with innocence. See pp. 2820, 2821, 1822, 1924 and 3380, Transcript.

JURISDICTION.

Appellants rely on Section 240 as amended, Judicial Code, Title 28, U. C. S. A., Section 347-A and Rule XI—Rules of Practice as promulgated by the United States Supreme Court to govern Criminal Procedure after conviction.

QUESTIONS PRESENTED.

The propositions herein involved are as follows:

1. The Government contended that the circumstances showing that some salesmen defendants represented to some investors that high returns on the investments would be made by them, that they would double their money, as embodied in the written contracts made with Forest Glen, Inc. which was limited to Marion cemetery, that the enterprise was a safe investment. In one or two instances a salesman stated on his own responsibility that the Government was back of the project, there being no proof or finding that such a statement was a part of any plan devised

by Marshall. That many of the investors were laymen, old people, and inexperienced in financial matters, and the further circumstance that they did not receive back the amounts promised at the time of the alleged receivership, May, 1938, that the sections were worthless, warranted a submission of the case to the jury and was sufficient to support the conviction, notwithstanding the presumption of innocence. (There is no evidence in the record to support the charge that the parks or sections are worthless. There is evidence that both are very valuable.)

The defendants contended that the circumstances showing the building and development of three beautiful parks, the expenditure of huge sums of money therefor, the repayment of a large amount of money to investors, the approval of the plan of financing by the Securities Department of the State of Ohio, the fact that the salesmen did not formulate the scheme of financial operations nor have any control over same, together with the circumstance that Robert Marshall alone devised and dominated the entire development, and that none of the alleged representations so far as the salesmen were concerned were illegal or fraudulent in themselves, were of such overwhelming weight that, taken with the presumption of innocence that surrounded the salesmen defendants, that the case as to them should have been taken from the jury and a verdict of not guilty directed. This was based on the simple rule of criminal jurisprudence that where all the circumstances relied upon for conviction are as consistent with innocence as with guilt, the defendants are entitled to an acquittal and the Court and Jury are imperatively required to give that verdict.

2. The salesmen defendants contend they were denied their right to a speedy trial as guaranteed by Article VI of the Constitution of the United States and as a result *no trial* as contemplated by our fundamental law was had by them.

3. Since the Government conceded that the alleged scheme to defraud is spread over 5000 odd pages of testimony and not stated in the indictment and since appellants did not know what it was with which they as salesmen were charged, until the Court of Appeals rendered its decision —were the appellants prejudiced and denied their constitutional rights of due process of law and to be informed of the charge against them under Amendments V and VI, United States Constitution?

If error appears on the record in a criminal case, involving an indictment under Sections 88 and 338, Title 18, U. S. C. A. and a plea of not guilty wherein the Trial Court rejected evidence offered by the defendant material to his defense and the record does not show affirmatively that such defendant who was convicted by a jury, was not prejudiced thereby and the Circuit Court of Appeals affirms said judgment of conviction, is such defendant entitled to a reversal and a new trial? *U. S. v. Wilkinson,* 12 How. (U. S.) 246; *Vicksburg vs. O'Brien,* 119 U. S. 99, 103; *Crawford vs. U. S.,* 212 U. S. 183.

4. Was it reversible prejudicial error for the trial court to overrule and deny a demurrer to such evidence filed by the defendants at the end of the Government's case, and again at the end of all of the evidence?

5. Was it reversible prejudicial error and a denial of due process of law when the Trial Court refused to permit the Prosecuting Attorney of Franklin County to testify that he had told some of the salesmen—before they commenced selling that he had investigated the cemetery projects and had found there was nothing wrong—this going to the issue of good faith thereby "preventing the first step in his defense"? *Derry's Lessee vs. Gray,* 5 Wall. 795, 808.

6. If the only circumstances upon which the jury rely to convict and the appellate court to affirm as stated in its decision, show nothing but participation in selling cemetery sections which sales under applications, contracts

and deeds have been declared by the Court not illegal, under the presumption of innocence, is that sufficient to support a conviction in the admitted absence of any direct proof of knowledge or an agreement to enter a scheme to defraud or an agreement to enter a conspiracy to commit an offense against the United States? Does mere participation in doing something which assists some one in carrying out a scheme to defraud, without proof or circumstances importing an agreement, warrant a conviction under Section 88, or 338, Title 18, U. S. C. A.? *Falcone vs. U. S.*, 311 U. S. 205, 210, 211; *Vernon vs. U. S.* (8 C. C. A.), 146 Fed. 121, 123, 124; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581; *Bebardi vs. U. S.*, 287 U. S. 112; *Linde vs. U. S.*, 13 Fed. 2nd 59; *Baraventura vs. U. S.*, 15 Fed. 2nd, 494, 495; *Dickerson vs. U. S.*, 18 Fed. 2nd (C. C. A. 8th), 887, 893; *Vernon vs. U. S.*, 146 Fed. 121, 123, 124 (8th Cir.).

7. The ruling of the trial Court on the motions for a directed verdict at the end of the Government's case and on the demurrer, that the most favorable construction in favor of the Government, must be given to the evidence and circumstances thereby submerging and nullifying the presumption of innocence, which remains with the accused at all times until convicted beyond a reasonable doubt, is without support in authority and is in violent conflict with the applicable decisions of this Court.

It creates so important a Federal Question as to unqualifiedly invoke the revisory and supervisory powers of this Court.

Kirby vs. U. S., 174 U. S. 47, 55, 56;
Coffin vs. U. S., 156 U. S. 432, 459, 461.

8. Was it the duty of the Circuit Court of Appeals upon an appeal from a conviction of a defendant under such state of the record, to reverse such conviction and remand for a new trial, or enter judgment for such defendants?

9. Was it prejudicial, reversible error for the trial court to admit evidence contained in paper writings, which it was contended by the Government was material to issues, when there was no witness on the stand and no opportunity for cross examination and when there was a conviction of such defendant or defendants, was such defendant denied his constitutional rights under Article VI of the Amendments of the United States Constitution? *Motes vs. U. S.*, 178 U. S. 458, 474; *Kirby vs. U. S.*, 174 U. S. 47, 55, 56; *Mattox vs. U. S.*, 156 U. S. 237, 242.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Your petitioners contend that a Writ of Certiorari should be allowed and that the decision of said Circuit Court of Appeals should be reversed by this Court for these reasons:

1. Under the applicable decisions of this Court on the record and of the Circuit Court of Appeals, the alleged scheme to defraud under this indictment can exist only on the basis that it was the intention of Robert Marshall and anyone who conspired with him not to carry out his contracts and agreements. Both the Government and the Circuit Court of Appeals concede in words or in effect, that there is no direct testimony of any agreement on the part of the salesmen to knowingly enter an alleged scheme to defraud or intending to defraud, or the alleged conspiracy to use the mails to defraud. The case against petitioners and each of them was predicated solely on circumstantial evidence. The Circuit Court of Appeals predicated its conclusions and affirmance of the convictions on circumstances which show nothing more than promoting the sale of sections which resulted in the execution of the plans, applications, contracts, deeds, documents publicly announced by which money was raised for developing the cemeteries, and in paying investors according to the terms of the contracts,

and payment of commissions, expenses, etc., which on the record are all consistent with innocence. In holding that the Trial Court did not err in submitting this case to the jury when the overwhelming weight of circumstances and the only circumstances relied upon to convict and to affirm that conviction, showed that the acts of the salesmen were as consistent with innocence as with guilt, the Circuit Court decided a very important question of general law in a way untenable and in conflict with the overwhelming weight of authority as announced by the Circuit Court of Appeals and the Supreme Court of the United States, as will be shown in our brief in support hereof. The question is of sufficient importance to compel the attention of this Court by Writ of Certiorari, since the United States Supreme Court well said:

> *"The enforcement of this presumption lies at the foundation of our criminal law."*

See

Sullivan vs. U. S., 283 Fed. 865, 868 (8th Cir.);
Durland vs. U. S., 161 U. S. 306, 313, 314;
Coffin vs. U. S., 156 U. S. 434, 452, 461;
U. S. vs. Ross, 92 U. S. 281, 283, 284.

2. The Circuit Court of Appeals in sustaining the conviction of the defendants sanctioned a departure by the Lower Court from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision. By so doing, it has also decided an important question of Federal Law which has not been but should be settled by this Court. The Trial Court in this case denied separate trials to the defendants and then required them to attend Court at a place foreign to their places of residence for a period of approximately six and one-half months. During this period of time the hours of trial proceedings as sanctioned by the Trial Court were continuously from 9:30 A. M. until 1:30 P. M. The Trial

Court permitted the Government attorneys to introduce and read in evidence hundreds of repetitious matters that were wholly unnecessary to a determination of the issues and to otherwise drag the case to an interminable length. A conservative estimate is that the trial of this cause could have been concluded in one-third of the time taken by the Government, had proper hours for trial proceedings been kept and had the Government been required to proceed with dispatch in the introduction of its evidence. The record of 5400 pages shows this. Should this Decision be allowed to stand, the practice of a prosecutor in purposefully dragging out the presentation of evidence in a criminal case and thus denying to the accused his right to a speedy trial is condoned and sanctioned. In our brief we point out the raising of this question and enough of the proceedings to show this point.

The Petitioners cannot make an affidavit that would permit them to proceed herein strictly *in forma pauperis*, but Petitioners are also without sufficient funds with which to have printed in this Cause the Record and the Transcript of the Testimony and evidence adduced in the Trial Court. The United States Circuit Court of Appeals permitted the Petitioners as upon *forma pauperis* to file a typewritten Transcript of the record and testimony and evidence adduced, in the Court of Appeals, and the Court of Appeals considered the case on the typewritten transcript of the Record and Proceedings at the trial. A Motion is, therefore, attached to and made a part of this Petition praying that this Honorable Court grant Petitioners leave to proceed herein on the certified typewritten transcript of the Record and testimony and evidence adduced in the Trial Court, and is transmitted to and filed herewith, with the Clerk of this Court.

3. The conviction of these appellants who admittedly only acted in the capacity of salesmen and had nothing to do with the administrative affairs of any of the

business involved, and the later affirmance of their conviction by the Court of Appeals establishes a precedent, whereby a prolonged discussion in the Jury room of extraneous matters which they were particularly warned not to discuss would be given at least a tacit approval, by the United States courts. These matters not having been in the record in any proper form and the trial judge having particularly warned against their discussion, they became matters entirely foreign to the record and were highly prejudicial. The motion for a new trial having been filed supported by affidavit has never been categorically passed upon by the Court of Appeals.

4. The indictment in this case was required to state an overt act as to one or more of the defendants. All overt acts were of the same nature and merely stated that the defendants had had conversations. We quote the allegation in the indictment relating to Willard S. Holcombe:

> "That the defendant, Willard S. Holcombe, on or about June 20, 1937, called on Frank Price, Newark, Ohio, and had a conversation with him."

This would seem not to be the charge of any overt act because it does not appear that the conversation pertained to any misrepresentation, or to any alleged scheme to defraud or to any conspiracy charged.

The insufficiency of that charge of overt act is clearly apparent when on reading the record, we find that that conversation with Frank Price contained no element of misrepresentation. There was therefore not only an insufficient charge of overt act, but a failure of proof of any acts which would constitute an overt act under this indictment. (pp. 2259-2269 Transcript.)

5. When the principal actor in this prosecution, Robert Marshall, who devised the alleged scheme to defraud as stated by the Court of Appeals, was called by his counsel for examination, Mr. Bigger, representing the salesmen, moved (pages 4114, 4118, 4121 of transcript) that:

"Thereupon Mr. Bigger made the following motion: I move the court instruct the jury that the testimony and evidence adduced through this witness, Mr. Marshall, cannot be used against any other defendant in support of the government's case and cannot be used unless and until any other defendant avails himself of his rights and puts his defense on.

"Thereupon the motion was overruled and exception granted as to all counsel."

The court then on page 4456 of the transcript laid down the rule:

"In the absence of anything in the contract (presumably contrary), we will lay down the rule that will govern in this case. Any witness called on behalf of the defendant or defendants, or any defendant, may be examined as ordinarily he would be as a witness on the behalf of the defendants. Any other counsel for defendants may further examine him as a witness on behalf of the defendants."

6. The record shows that the appellant Holcombe had honestly and industriously endeavored to learn whether there was anything unlawful in this transaction and had been advised by the Prosecuting Attorney of Franklin County, who investigated it, that it contained no unlawful element and no reason why he should not go ahead and sell. The testimony of the Prosecuting Attorney would have had a direct bearing upon the criminal intent and good faith of Holcombe, yet he was denied the benefit of that testimony. He was denied proof in the first step in his defense. The rejection of that testimony was prejudicial error, it was a denial of due process and was a departure from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's power of supervision.

The three foregoing reasons all constitute a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding that Court to certify to and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases of E. G. Blue, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9241; W. N. Clark, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9242 and Earl Pardee, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9243, and that said judgment of the said United States Circuit Court of Appeals be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

E. G. BLUE,
WILLIAM N. CLARK,
WILLARD S. HOLCOMBE,
DAN S. RIGGLE,
BYRON L. MCCLURE,
CARL A. BEMMAN,
GEORGE F. BUCK,
EARL PARDEE,
GEORGE E. REINWALD,
W. HAL MARSHALL,
A. L. MALOTT,
EARL L. HOLLIDAY,
S. F. NEIDIGH,
R. C. DECK,
HIRAM BERRY,
Petitioners,

By MATTHEW L. BIGGER,
FRANK WIEDEMANN,
Counsel for Petitioners.

CARRINGTON T. MARSHALL,
Co-Counsel for Willard S. Holcombe.

STRELITZ, DOWLER & WIEDEMANN,
Marion, Ohio,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM 1943.

No.....

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED HEREIN ON TYPEWRITTEN TRANSCRIPT OF RECORD AND OF THE TESTIMONY AND EVIDENCE ADDUCED IN TRIAL COURT AND OF THE RECORD OF CIRCUIT COURT OF APPEALS AS FILED HEREIN.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, E. G. Blue, *et al.*, respectfully move this Court for an Order granting them leave to proceed herein on the typewritten transcript of the record and testimony and evidence adduced in said Cause in the Trial Court for the reason that said Petitioners cannot make an oath and proceed herein *in forma pauperis*, neither are Petitioners financially able to bear the cost of having printed the Record and the transcript of the testimony and evidence adduced. Said transcript of testimony and evidence is contained in approximately 5700 typewritten pages and 1700 Exhibits and Petitioners were granted leave by the Court of Appeals to proceed in said Court of Appeals on said

typewritten transcript and did so proceed therein. Petitioners say further that as to them, the cost of printing said transcript of testimony and evidence is prohibitive and to deny this Motion would prevent them proceeding herein by Petition for Certiorari.

Respectfully submitted,

E. G. BLUE, ET AL.,

By MATTHEW L. BIGGER,

By FRANK WIEDEMANN,

Counsel for Petitioners.

CARRINGTON T. MARSHALL,

Co-Counsel for Willard S. Holcombe.

STRELITZ, DOWLER & WIEDEMANN,
of Marion, Ohio,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM 1943.

No. . . . . .

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

The first opinion herein of the United States Circuit Court of Appeals for the Sixth Circuit was handed down on October 14, 1943, Reported in 138 Fed. (2nd) 351. The Petition for Rehearing was denied on February 9, 1944, and a short memorandum, in regard thereto, was filed with the denial of a Rehearing. Both are attached hereto.

II.

JURISDICTION.

(a) The statutory provision believed to sustain jurisdiction in this Court is Section 240, amended, of the Judicial Code, 28 U. S. C. A., Section 347 (a).

(b) The judgment sought to be reversed was rendered on October 14, 1943. A Petition for Rehearing was duly

filed and was denied on February 9, 1944. The Court of Appeals on February 15, 1944, entered an Order in Cases Nos. 9241, 9242, 9243, staying the Mandates herein for 30 days in order to afford Appellants an opportunity to make Application to this Court for a Writ of Certiorari and further provided therein, that said Mandates shall be stayed for such additional time as may be necessary to a final disposition of this cause, if a Petition for Certiorari is filed in this Court.

(c) The nature of the case and the rulings relied upon as a basis of this Court's jurisdiction are shown in the Petition for Certiorari hereinbefore set forth and hereafter in this Brief.

III.

STATEMENT OF THE CASE.

Reference is here made to the summary statement contained in our Petition which is adopted and made a part of this Brief.

IV.

ASSIGNMENT OF ERRORS.

The assigned errors intended to be urged are:

1. The Trial Court and the Circuit Court of Appeals erred in holding that there was sufficient evidence to sustain the conviction of the Appellants.

2. The Trial Court and the Circuit Court of Appeals erred in not holding that the verdict of conviction and judgment of the Court were contrary to law.

3. The Trial Court and the Circuit Court of Appeals erred in not holding that the Petitioners were denied a fair trial as guaranteed to them by the Constitution of the United States of America, Amendments, Section VI.

4. The Trial Court erred in refusing to admit testimony and evidence on behalf of the defendants to establish good faith and state of mind of defendants, thereby preventing defendants from establishing their defense and the Court of Appeals erred in sustaining the judgment of the Trial Court on said point.

The record does not show affirmatively that appellants were not prejudiced thereby.

5. The Trial Court and the Court of Appeals erred in not holding that upon the undisputed facts of record in evidence that the acts of the defendants upon which the verdict and judgment of the Court were predicated were as consistent with innocence as with guilt and that they were entitled to the direction of a verdict of not guilty by the Trial Court at the close of all of the evidence.

6. The Court of Appeals erred in sanctioning a departure from the accepted and usual course of judicial proceedings by the Lower Court in not holding that as a matter of law the Trial Court denied to the Petitioners the right to a speedy trial or the right to any trial as provided by the Constitution of the United States.

7. That the Circuit Court of Appeals, in rendering its decision, failed and refused to apply the law as declared by the Circuit Courts of Appeals of the United States and as declared by the Supreme Court of the United States, affecting the substantial rights of the appellants on the record.

The Circuit Court of Appeals recognized, by its opinion, that there was no direct proof or testimony against the appellants at the trial of the issue, that the appellants knew of or knowingly entered a scheme to defraud or knowingly used the mails therefor; that there was no direct testimony or proof that the appellants knew of, or knowingly entered a conspiracy with intent to use the mails therefor.

The Circuit Court of Appeals by its decision in effect found that the case as against appellants rested solely on circumstantial evidence and catalogued the circumstances upon which it relied, to affirm the conviction of appellants.

The circumstances so relied upon by the Circuit Court of Appeals in affirming such convictions and the circumstances which the jury of necessity had to rely upon, for conviction upon the essential elements of the alleged offenses set out in the indictment, taken separately and collectively, were consistent with the presumption of innocence.

8. Error was apparent upon the record in the Transcript of the proceedings had at the trial in this to-wit:

The Trial Court admitted testimony and evidence objected to by appellants prejudicial to appellants which was incompetent and irrelevant. The record does not show affirmatively that appellants were not prejudiced thereby.

The Trial Court admitted evidence prejudicial to appellants when no witness was on the stand over the objection of a defendant therein, thereby violating the right to confrontation of witnesses guaranteed by the Sixth Amendment to the United States Constitution, and the record does not show affirmatively that appellants were not prejudiced thereby.

9. For other errors apparent upon the record prejudicial to these Petitioners resulting in violation of their constitutional guaranty and rights.

In all of the foregoing the Decision of the Circuit Court of Appeals in affirming the convictions of the appellants was in conflict with the applicable, controlling decisions of the Circuit Courts of Appeals and of the Supreme Court of the United States.

V. ARGUMENT.

I.

THE PRINCIPLES OF LAW INVOLVED HEREIN ARE VERY IMPORTANT TO THE GENERAL PUBLIC AND ESPECIALLY TO THOSE WHO ARE ACCUSED OF A CRIME AND BROUGHT TO TRIAL IN A COURT OF LAW. ARTICLE VI, AMENDMENTS TO U. S. CONSTITUTION, GUARANTEES ACCUSED A SPEEDY TRIAL. ACCUSED WERE DENIED A SPEEDY TRIAL.

The trial of this case began on September 21, 1941. The hours of trial were set by the Court as from 9:30 A. M. until 1:30 P. M. (Record, page 2311.) Counsel agreed to these hours. However, at that time no one of defense counsel could foresee that the Federal prosecutors would offer and read in evidence hundreds of documents, all of a similar nature, and 99% of which were cumulative evidence; none of counsel for the Petitioners had any idea that Government counsel would offer such a tremendous amount of repetitious testimony; no one could foresee that the Court would permit the case to drag so slowly for such a long period of time. After the case had been in progress for a few weeks one of defense counsel objected to the methods being pursued, to the hours of trial, and to the length of time that the trial was taking. The matter was taken up with Government counsel and with the Trial Court in chambers and finally in open Court on December ...., 1941. (Record, page 2312.) Statement of counsel is herewith set forth verbatim as reflecting the true situation at that time. (Record, page 2248d.)

Between October 10, 1941 and November 27, 1941 ten trial days had been consumed. During this period of time only twenty-four witnesses were presented by the Government and examined. (Record, pages 5 to 617.) Between October 27, 1941 and November 17, 1941 only twenty witnesses were presented and examined. During this period of time thirteen and one-half trial days were consumed and less than two witnesses per day were examined. (Record,

pages 617 to 1202.) These are examples of what transpired in the Trial Court before the motion was made by counsel on January 6, 1942 to dismiss for the reason that a speedy trial had been denied Petitioners.

A reading of the record, pages 2247, 2248, 2248(a), 2248(b), 2248(c), 2248(d), 2248(e), 2248 (f), and 2248(g) will show some of the unnecessary talk by counsel for the Government and by the Court, and the inexcusable methods used by the Government. In this connection, the prosecutor even introduced evidence that pertained to a dead defendant. (Record, page 2228.) Twelve exhibits pertaining to a transaction she and her dead husband had with the dead defendant were introduced and read to the jury. The only conceivable purpose of this testimony was to show the common plan of those charged and certainly if it had not been shown at this state of the proceedings, it would never be shown.

2248(d)—Transcript of Testimony:

"Mr. Wiedemann: At this time on behalf of the defendants Jacoby and Molloy we move that the Court dismiss the indictment as to all ten counts on the ground that to compel these men to stay here longer and answer the charges made against them would be a denial of their constitutional rights to a speedy trial under the Constitution of the United States.

"My argument will be briefed on my motion.

"As Mr. Bigger has well stated, it must certainly be very apparent to the Court, as to everybody else who has had any connection with this case, that these defendants have been put to a terrible hardship to come here day after day since September 23rd, 1941, and answer the charges made here, and especially is that hardship almost unaccountable when the Government has spent all this time in a vain attempt, as we think, to simply show a scheme here and during that period of time have not produced any substantial evidence in our opinion, and we say that sincerely, that shows any scheme here to defraud. There certainly

must be, if your Honor please, some limits to which the Government must be confined in its presentation of evidence against the defendants in a criminal case. Certainly no man should be compelled to sit in a court room, and sit there day after day listening to the prosecution put on witness after witness who does not in any way connect him with the charge in the indictment, and sit there day after day, and week after week, and month after month, without having some protection thrown around him and without having the right after a certain length of time has gone by to have the Court say: 'Now, Mr. Prosecutor, you have gone far enough with your evidence in this case.' We will say that Mr. Jacoby and Mr. Malloy have waited here now three months and during that period of time there has not been one scintilla of evidence offered against them or either one of them. Now, Mr. Prosecutor, let us hear what you have to say, let us hear the evidence against these two men, and let us hear it quickly or else the Court will under the Constitutional rights of these men to have a speedy trial dismiss them from the case.

"If your Honor please, none of these men who are defendants in this case are rich men, as Mr. Bigger says. Some of them are working nights in an attempt to support themselves and their families while this trial goes on. Most of them live at points that are distant from the scene of this trial and they have to drive here day after day and work nights, and then come here and spend their days here in this courtroom, and all during that time the Government goes on presenting evidence that I suppose is an attempt on the part of the Government to prove a scheme, but which I say to this Court, and which must be apparent to everyone, that there are only isolated instances on the part of the Government to show that certain salesmen made certain statements that were not lived up to.

"Now, if the Court please, I think the time has been reached in this case when the Government ought to either be compelled to connect up these two defend-

ants and do it speedily, or I think the charges against them should be dismissed. I say that I think our motion is well taken at this time and should be sustained at this time, and the defendants dismissed, and I think that if they are not dismissed they are denied their right of a speedy trial under the Constitution of the United States and the state of this record."

The Court lost no opportunity to bring to the attention of the jury specks of evidence that Government counsel had not seen. Testimony set forth on pages 2234, 2235 and 2236 are examples. On these occasions the Court talked and talked and talked. Other parts of the record to illustrate this point are found on pages 2193 to 2313. A written Motion to Dismiss for the reason that the defendants were being denied their right to a speedy trial was considered and overruled by the Trial Court on January 6, 1942. (Record, page 2248(d).)

Thereafter, after several weeks had gone by in which the proceedings continued to drag and counsel continued to object, the Court finally changed the hours but without changing his methods of supervision, and the gross slowness continued. The trial was not concluded until April 1, 1942 when the case was sent to the jury. Thereafter, the jury was allowed to deliberate for six days before it reached a verdict.

The Trial Court was not pleased when counsel objected to the delay and the refusal to grant a speedy trial. We set forth herein parts of a statement by the Court made immediately after the jury had returned its verdict of guilty which shows his attitude in this regard and our point that this question had been brought to the attention of the Court not only in open Court but on other occasions:

"Gentlemen, there has been intimation from time to time in this case, not unkindly, but nevertheless rather firmly, that this case had taken too long, that the Government was too long in presenting their case, the jury was out too long and too much time has been

taken. * * * The matter is now in the hands of the Court and any further delay would be mine so I shall not delay this matter any longer than I deem it necessary. I will dispose as to all the defendants who have been found guilty on Friday morning of this week at 9:30. * * * So on Friday morning at 9:30 all the defendants will come here prepared. If they are sentenced to jail or a penal institution there will be no bail to anyone. They will have to go to a jail or penal institution unless bail is granted by the Circuit Court of Appeals * * *. When you come on Friday you will come with that kind of arrangements. For the benefit of everyone and particularly for the benefit of Mr. Wiedemann, I will see there is no further delay in this case."

The utter disregard by the Court and the prosecuting officials of the Government of the rights of these defendants to a speedy trial is apparent on almost every page of the record and it is so gross and so inexcusable and such conduct strikes such a blow at such a fundamental right as to require this Court to exercise its supervisory powers herein and to admit and reverse this case. Holding these men in Court for such an unnecessarily long period is further aggravated by the fact that these Defendants filed Motions for separate trials and also signed waivers so that it would not be necessary for them to be present at all times. These Motions were denied, the waivers disregarded, and the Court *ordered* the Defendants to be present at all stages of the proceedings. (Record, pages A5, A6, A7 and A8.)

The defendants were not given a trial as contemplated by the Constitution. In the place of a trial to which they were all entitled they were forced to attend before the District Court for a period of six and one-half months while a disconnected series of episodes were laboriously and slowly dragged from the mouths of hesitant and confused witnesses in an effort by the Government to show them guilty of offenses which they had not committed. It

is gross understatement to say that the jury could not possibly have understood the issues involved.

Article VI of the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * *."

In the face of this record, how can any Court say that these Defendants were given the protection afforded by this provision of our Constitution?

II.

THE PRESUMPTION OF INNOCENCE LIES AT THE FOUNDATION OF OUR CRIMINAL LAW. THE UNITED STATES SUPREME COURT UTTERED THAT STATEMENT. THE ENFORCEMENT OF THE PRINCIPLE IN A CRIMINAL CASE.

> "That the defendant is presumed innocent until proven guilty beyond a reasonable doubt" is just as important and just as sacred as the guarantee of "Life, Liberty and Property."

Both of these guarantees lie at the foundation of our fundamental institutions. They are a part of our traditions. This "presumption" must be recognized as a living, vibrant, vital, indispensable force, essential to accused citizens and to the preservation of our institutions.

To ignore it, to evade it, to emasculate it, to treat it lightly, is to reduce the trial of a criminal case to the level of a civil case.

When that happens, our constitutional system becomes a mere memory, not even a heritage.

Our only guide in this matter and in this case, is the applicable law as laid down by this Court and by the Circuit Court of Appeals.

If those decisions and great precedents are living symbols and assurances of protection, if this Government has not "become a government of men and is still a gov-

ernment of laws" then there can be no question, but what this case will invoke the revisory powers of this Court because the decision of the Circuit Court of Appeals in this cause, is in violent conflict with the applicable decisions and precedents of both High Courts.

This case then becomes one of far reaching importance to the Bench and Bar of the Country and to every citizen, who in the future may be subject to indictment on evidence which is concededly purely and exclusively circumstantial. This is true in view of the full statement made by the Circuit Court of Appeals of the circumstances upon which it relies for affirmation of the conviction of appellants.

The Government, as alleged in the Petition, in their reply brief, C. C. A., p. 2, said, *they could not adequately define the "scheme to defraud and the evidence" because the scheme and evidence are spread over 5000 odd pages of record.* That is *"as the scheme affects the individual appellants."* That is 5000 odd pages of circumstances—the District Attorney made that statement when only the case of the salesmen was before the Circuit Court of Appeals. That can only mean—the indictment "did not inform the appellant salesmen of the nature and cause of the complaint against them" as required by the Sixth Amendment to the United States Constitution.

The circumstances related by the Circuit Court of Appeals in its decision, 138 Fed. 2nd 351, are the only circumstances and the only evidence and the only testimony adduced against any of the appellants on the charge either, of

1. Devising a scheme to defraud, and the use of the mails therefor, or

2. Of knowingly entering into an agreement to conspire to use the mails, to carry into effect such a scheme.

Concededly there was no proof or direct testimony of an agreement on the part of any of the appellants as to either offense.

Therefore, the presumption of innocence must be applied to each and every circumstance or chain of circumstances, relied upon for conviction, or for affirmance of conviction.

If reliance is placed on a chain of circumstances and if any circumstance of that chain is susceptible of an inference of innocence, then the jury cannot convict, and in the event of a conviction the Circuit Court is required under the established rule and principle applicable in criminal cases to reverse the conviction.

Where this state of the record exists, the trial court is imperatively required as a matter of law to direct a verdict of acquittal.

Since that rule of action is the declared and established law then the question becomes one of law for the Court. The Court is not empowered to submit the question to the jury for it to find an inference of guilt or innocence.

That can be done in a civil case where the jury renders a verdict on the preponderance of the evidence and no presumption taking the place of proof or evidence—exists in favor of any defense, or in favor of any issue in behalf of the defendant raised by his answer. *Lilienthals Tobacco Co. vs. U. S.*, 97 U. S. 237, 266, 267; *Wolf vs. U. S.*, 238 Fed. (4th Cir.) 906.

This principle of "presumption of innocence" is a rule of proof,—evidence,—existing in favor of the defendant in criminal cases, and the Court and the jury have no discretion in the matter, but are both and each of them, imperatively required to resolve the inference in favor of innocence of the defendant.

The Supreme Court of the United States stated in *Coffin vs. U. S.*, 156 U. S. 434, 452, 456, 461:

> *"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary and*
>
> *Its enforcement lies at the foundation of our Criminal Law."*

If that presumption as stated by the Supreme Court, lies at the foundation of our Criminal Law,

Then it becomes highly important and immediately pertinent to inquire, whether that presumption has been applied to the circumstances in this case as it affects the appellant salesmen, and whether it has been applied to safeguard their constitutional and legal rights, or

Whether it has been treated as of no consequence (as stated in *Kirby vs. U. S.*, 174 U. S. 47, 55, 56), or protection to the accused appellants, and whether the Court, in effect, permitted the jury to draw any inference it chooses, from the circumstances, regardless of that presumption, if the jury is the final arbiter and can draw an inference of guilt, from a circumstance which is consistent with innocence then the presumption has no force. It affords no protection.

If the presumption means anything, it must mean, protection. It must have some force. The Courts have said it is sufficient in doubtful cases to turn the scales in favor of the accused. *Lilienthals vs. Tobacco Co.*, 97 U. S. 237, 266, 267.

In a case where the circumstance is unlawful or on its face imports fraud or knowledge of fraud, to the exclusion of innocence then of course the jury would be entitled to draw whatever inference it would choose.

But where, as in this case, the circumstances relied upon are admittedly legal as charged by the District Court to the jury and are not fraudulent in themselves, where they do not import illegality, fraud or knowledge, of either or of criminality, but are such as even the trial court itself admitted, in one instance, when the trial court admitted documents against Holcombe with no one on the stand, apparently relied upon by the Court of Appeals among other circumstances noted, to affirm the conviction, and stated that such circumstance, "was not inconsistent with innocence" (p. 2821, Transcript) then the jury is

imperatively required, and the Court is imperatively required to resolve the circumstance or circumstances in favor of innocence. The Supreme Court has expressed this controlling rule of law in the following language in *Dunlap vs. U. S.*, 165 U. S. 486, 502, 503.

P. 502.

> "The presumption of innocence is a presumption of law that the defendant did not do the things alleged. *This must continue in the minds of the jury, in such a way as to cause the jury to find the defendant, not guilty unless from all the evidence, in the case beyond a reasonable doubt, the jury are convinced that the defendant did things charged against him and knew the facts which constitute the offense.*"
>
> "And this presumption is not overcome by facts which are not plainly inconsistent with innocence." *Wolfe vs. U. S.*, 238 Fed. 902, 906 (4th C. C. A.).

Now the jury cannot ignore a reasonable doubt if the circumstances under the presumption of innocence creates a reasonable doubt. The law creates the reasonable doubt under the presumption of innocence as stated by the United States Supreme Court, in *Coffin vs. U. S.*, 156 U. S. 434, 458, 461. The jury does not create it, or choose to create it. It is the law.

If it is the law and the law creates "reasonable doubt" in a criminal case under the presumption of innocence, then the question of whether a verdict of acquittal shall be directed, where there is no direct proof but where all the circumstances proved and relied upon, are obviously and concededly consistent with innocence, becomes one of law for the Court. "The presumption must continue in the minds of the jury so as to cause them" to acquit the defendant, said the United States Supreme Court, 165 U. S. 502, *supra.*

Stemming from this "presumption of innocence," there are other important principles and presumptions—some positive and some negative, but all designed to protect

and safeguard the fundamental constitutional rights of an accused.

Fraud is never presumed. Bad faith is never presumed. Dishonesty is never presumed. The contrary is presumed, i.e., that the transaction was free of any fraudulent intent unless the act is criminal or fraudulent in its nature or made so by statute. Good faith is presumed. Honesty is presumed. The selling of cemetery sections for profit or on any plan sold herein, was not made illegal or criminal by any statute. Neither did any statute make such selling, a scheme to defraud or a conspiracy.

See *Gregg vs. Lessee Sayre,* 8 Peters; *U. S. vs. Arredando,* 6 Peters, 691, 716; *Dalton vs. U. S.,* 154 Fed. 461, 463; *Lessee Tinker vs. Moorland,* 10 Peters 58, 78; *Farrar vs. Churchill,* 135 U. S. 583, 615.

The circumstances as related by the Circuit Court of Appeals to justify its affirmance of the conviction of the salesmen appellants are found on pp. 355, 357, 358, 360, 361, 138 Fed. 2nd. They are the circumstances which the Court said *warrant an inference* that appellant salesmen devised a scheme to defraud in July 1933, or knowingly entered a scheme to defraud and justify an inference that the salesmen agreed upon a conspiracy in July 1933 to use the mails to carry out such scheme or knowingly entered such conspiracy thereafter.

They are not charged, however, in the indictment with having knowingly come into the *scheme to defraud,* after it had been devised, or with having come into the conspiracy knowingly, after it had been formed.

Neither are they charged with aiding and abetting the substantive offense of devising a scheme to defraud and using the mails therefor.

There is not a single circumstance, related by the Court, which is unlawful or criminal because specifically made so by statute. There is not a single circumstance related by the Court which is fraudulent in itself. There

is not a single circumstance related by the Court which repels and which is inconsistent with the presumption of innocence.

There is no law against agreeing to resell property for 25% to 100% of the amount paid therefor, *if, and when, it can be sold,* as those contracts admittedly provided. There is no law which prohibited selling sections on any plan upon which they were sold. There is no law against any salesman using any list of people or stockholders in any institution by an individual salesman personally—to run down prospects.

The Court of Appeals said Marshall purchased "sucker lists" and gave them to some of the salesmen in order to carry out the plan conceived by Marshall.

There is no evidence or circumstance that any list was a "sucker list," there is no evidence that the salesmen used any such kind of a list. There is evidence that a very few salesmen did use a list of stockholders in building and loan and financial institutions and other corporations, but it was not used to mail out inquiries and soliciting prospects. No prospect was procured that way. All sales were made by personal solicitation. No sales was closed through the mails. The Government failed, when they attempted to stamp these lists as "sucker lists" and the Court sustained an objection to that characterization. (See pp. 4280-4281 Transcript.) Yet the Court of Appeals called them "sucker lists."

There is nothing illegal or fraudulent about that and though one or two did use a list of investors, that cannot be imputed to any other salesmen, under the presumption of innocence.

There is no law against a salesman making more than one sale of cemetery sections or trying to get a good allocation or monthly payment for his customer and asking that payments provided in the contract be made, so as to have a satisfied customer and so as to enable him to make other

additional sales. It was not illegal to use the mails to either sell a cemetery section or to mail checks payable on any contract.

These salesmen were admittedly licensed by the state to sell such sections. (pp. 4619, 4637, 4644, 4667, Transcript.) The plans had been substantially approved by the State through the Director of Commerce. (pp. 3529, 3539, 3878 to 3880, 3540, Transcript.)

It is a safe and reasonable assumption, since the Circuit Court of Appeals painstakingly catalogued the circumstances which it deemed sufficient justification for conviction and an inference of an unlawful agreement, that if there had been any other, more damaging, unlawful or criminal acts evidenced that the Court would have related them. But the Court did not.

When the Court of Appeals said that "Marshall may have imposed on some of his salesmen, and that others acted in good faith."

Did the Court refer to Clark who put $30,000.00 of his money in the purchase of sections on the same terms as other investors, to many other salesmen who with their families spent thousands of dollars in the purchase of sections on the same terms as other investors such as Pardee, Riggle and many other salesmen as the record indisputably discloses?

Did the Court refer to such salesmen as Neidigh and McClure and others, Appellants, who engaged mostly in selling sections at retail, showing their obvious faith in the project and their clear intention to assist in carrying out contracts, which they and other salesmen had sold to the so-called investors. The Court of Appeals in its decision recognized and stated that some of the appellants who sold at wholesale, sold also at retail. *That can only mean, they intended to see their contracts carried out. That does not import a scheme to defraud, or even fraud, or an agreement or conspiracy.*

Or, did the Court refer to such men as Holcombe who approached the County Prosecutor in April 1936 and said:

> *"He was thinking of selling sections in this cemetery,"*

referring to Glen Rest, and that he heard he had investigated it and whether he found anything wrong, and whether it was all right for him to sell and *who in April 1936, thereafter,* became a licensed cemetery salesman for this project and that Hoskins told him "Yes, he investigated, found nothing illegal or wrong, and there was no reason why he should not go ahead and sell." (pp. 4560, 4573, Transcript.) The Court refused to let Holcombe have the benefit of this testimony as will be pointed out hereafter.

To whom did the Court refer when it said some salesmen promised to double the money, some said it was safe, some said the Government was behind it, and some did this and some did that. And on what principle or circumstance under the presumption of innocence did the Court impute these things to other appellants who did not say or promise such things.

To whom did the Court refer. The Court could not have referred to all of them, because the Court said some *were guilty of one type of conduct and some were guilty of another type of conduct.*

There is no principle of law of which we know, in a criminal case, under the presumption of innocence, which permits any Court to impute to one jointly charged—any so-called guilty act of or any act of another party of any kind, of which no specific knowledge is established. *This must be true unless a defendant is presumed guilty instead of innocent.*

It is obvious from the Court's opinion that it placed reliance chiefly on the testimony of Marshall and on the contracts of a few made in Marion to justify its affirmance.

His testimony covered many conditions covering a period of time before any salesmen had anything to do with these cemeteries and after May 18, 1938. Most of the salesmen appellants came in long after Marion was practically sold.

Why should these salesmen be prejudiced by anything Marshall said or did, but of which there is no evidence of knowledge or participation with knowledge on the part of any salesmen.

All of this has been brought about and innocent salesmen are asking a hearing in this Court, because the Trial Court and the Court of Appeals failed to enforce the Presumption of Innocence as applied to facts and circumstances which admit and do not exclude an inference of innocence,

And because the Appellate Court failed and refused to recognize the injunction laid down by the Supreme Court,

That "the enforcement of that presumption lies at the foundation of our criminal law."

In relating the circumstances evidencing guilt, the Court of Appeals frequently stated its conclusions or inferences, as if they were a fact.

It will be noted that the Court of Appeals said:

> "The salesmen made successful requests to Marshall to repay cash profits when there were no profits."
>
> "Similar requests that the company re-purchase lots from certain investors in order to carry out the deception that the plan actually doubled the investments."
>
> "Arrangements that discrimination be shown in the payment of promised returns, so that certain investors would be paid so as to enable the making of other sales."
>
> "Representations that cemeteries are necessary."

It is apparent from the foregoing that the words "in order to carry out deception," "to repay cash profits when there were no profits" so that "certain investors would be paid large apparent profits," are all either legal conclusions and assumptions and not facts, or

They must have been predicated on some circumstance which openly reveals a direct connection between that inference and the material circumstance proved. This must be true under the decision of *Manning vs. Mutual Life Insurance Co.,* 100 U. S. 693, 697.

Since sections were sold at retail for an amount of $1,332,880.66 (p. 2570, Transcript), at prices ranging from $125.00 to $500.00 aggregating 14000 sections, the wholesale salesmen and appellants had a right to believe that the enterprise was a success. *It gave every evidence of legitimacy, as established by the Government's own figures.* Admittedly *the salesmen did not handle the finances, banking, bookkeeping, etc.* They were not officers or managers of the enterprise. There is nothing related, which warrants against the inference of innocence, that they knew that any investor was being paid a profit when there was no profit or that the company promised a profit not intending to pay it. There is nothing related by the Court or apparent in the applications, contracts, deeds or checks issued or money paid, which warrants an inference that appellant salesmen were any part of a scheme to defraud or that they "were carrying out knowingly any deception." The presumption of innocence, good faith, absence of fraud, repel any such conclusion. The Court and Jury must resolve the inference in favor of innocence.

The request of any salesman that a contract be carried out, that payments be made as provided in the contract, that Forest Glen, Inc., repurchase a section as provided in a contract, even though he made it, in the hope and for the purpose of enabling him to make other sales to the same person or other, does not warrant an inference of knowledge and intent that "there were no profits," that "the purpose was to carry out the deception," that the purpose was to pay certain investors, "apparent profits." To justify these inferences all the papers would have to be criminal and illegal or there would have to be direct proof of the

fact. It is conceded and a matter of record there was no direct proof of the material elements of the offense, or knowledge or agreement on the part of the salesmen. It is also a fact the Court charged the jury the papers and sales were not unlawful. Therefore, the only basis for the Court and the Jury's inferences, were inferences from inferences. That cannot be done under *Manning vs. Mutual Life Ins. Co.*, 100 U. S. 693, 697.

The expression of opinion that "cemeteries are necessary" (and on the record it can only be an opinion), cannot be the foundation for a charge of fraud, to say nothing of trying to infer an agreement to devise a scheme to defraud. See *School vs. McAnnulty,* 187 U. S. 107. *Are not cemeteries necessary?*

It is important here to note what the Circuit Court of Appeals said in its opinion about inferences from these circumstances to establish a scheme to defraud, and a conspiracy, with intent to use the mails.

After reciting the circumstances related herein and a few others, the Court said it was for the jury to draw an inference from what the witnesses said the salesmen said which was incorporated in the agreements and from their asssociation with Marshall, and from their conduct, whether they were made pursuant to a scheme to defraud, whether there was an understanding with Marshall, whether there was an intent to use the mails and whether they entered a conspiracy (pp. 358, 361, 138 Fed. 2nd), which of necessity, must mean an agreement. If there was no formal agreement, the circumstances must create an unlawful agreement to the exclusion of innocence.

A situation is related herein from pp. 2820, 2821, transcript, wherein the Trial Court conceded, that a circumstance which it permitted to go to the jury was consistent with innocence, but the Court said the jury might draw another inference from it, an inference of knowledge and guilt. Such a ruling strikes at the very foundation

of the defense of an accused, as violating the principle of the presumption of innocence.

Another situation involving the same question and non-observance of this principle but involving the applications, contracts and deeds is found on pp. 1823, 1824, transcript.

The witness called by the government could not testify as to any misleading statement or misrepresentation upon the part of the salesmen. The testimony involved, pp. 1805 to 1886 inclusive, is a labored, seeming effort to get the witness to say something damaging, without success. The exhibits in this case begin with Government Exhibit 633, p. 1806, application etc.

On pp. 1822, 1824, transcript, motion was made by defendants to strike out all testimony and exhibits on ground they do not import fraud or scheme to defraud. The Court said (p. 1823):

> "I will overrule the objection and instruct the jury that there is no testimony here * * * that Mrs. Hoffman, mother of the witness, was induced by anything that was said to enter these contracts or make these applications."
>
> "I say that because the witness here while he remembers that Mr. Mallott was there, he has no recollection of what the conversation was, so we have no testimony, but *you may take these exhibits later on when the case is finally submitted to you for the purpose of finding out what the exhibits show if anything with regard to the charge that is contained in the indictment in this case; that is to say that the defendants were engaged in a scheme to defraud, for that purpose.*" (Italics ours.)

The district attorney on p. 1823, transcript, said they were competent "for what they were worth and to determine whether or not that is a promise to give a definite profit." On p. 4365, transcript, he conceded it was not illegal to raise money by selling these sections at wholesale to

build the cemeteries and reselling them to pay a profit to the investors who furnished the capital for development.

The Court charged the jury later, that these applications, documents, contracts, deeds, etc., were not illegal in and of themselves, that the sale of the sections were not illegal.

This is what took place.

Bigger, page 4364:

"Now I am coming back to the other question which I have persisted in and which has been touched upon by Mr. Crawford, and that is this:—And I want to get it into the record, because this whole scheme seems to be founded upon that proposition, but has been evaded. Is it the contention of the Government that the sale of these sections for investment purposes and the resale for utility purposes, under this plan and on the record under these contracts and deed is, itself, illegal?

If that is the situation we again request the district attorney to state his position which in my opinion has been evaded heretofore in this record. We believe that as a salesman, that we have a right to know the position of the district attorney, of the government upon that matter. If that is the position of the government and if that is the law, if the Court takes that view that is the law, no one here can put up a defense, because we did admit that we sold, we are convicted before we start. But if it is not illegal in itself, if it is not illegal to make these sales, then that is another question, then we have a chance for a defense.

We believe we have a right to know that proposition and to know the district attorney's position upon that matter, on the record of this case in the indictment.

Mr. O'Donnell: I will try to answer Mr. Bigger * * *" (page 4365).

Page 4366, Transcript:

"Now answering Mr. Bigger's question, no, we do not claim it was illegal to sell cemetery lots, but it is

the mode of the *scheme*, the *whole* thing which was illegal."

Then he said the fraud was taking more than was necessary for development purposes. The Federal Court held in *Van Tess vs. U. S.*, 292 Fed. 513-519-521 (Ohio), the salesmen could not be charged with knowledge of that fact where they are just "salesmen and sell more than the management can fulfill."

Then this followed (pp. 4366, 4367):

> "Mr. Bigger: Then, I understand, Mr. O'Donnell, it is not the contention of the government that it was fraudulent or illegal to go out and raise the money which really was necessary to build and develop the park and pay a profit upon that * * *?
>
> "Mr. O'Donnell: No.
>
> "Mr. Bigger: That is all right then."

Now in view of the Court's charge to the jury, the admission of the Government, *supra*, the statement of the Circuit Court of Appeals, that "the scheme to defraud and the conspiracy consisted in selling cemetery sections for investment" (although the Government and Court said was not illegal or fraudulent) if all that is all true, then, there must *have been something besides* doing what was lawful—as was done by the salesmen, essential to constitute that scheme to defraud, and knowledge and agreement must be established by circumstances, or facts—other than the sales—admittedly lawful. None such have been pointed out by the Government or the Court of Appeals. Those acts in selling, etc., were consistent with innocence.

It could only consist as stated in the *Durland* case in an intent not to carry out the contract, but that intent on the admissions and concessions set out above, could not under the presumption of innocence be inferred, or imported from the salesmen doing that which was legal. If that intent existed on the record under the Court of Appeals decision, it could exist only in Marshall's mind and knowledge.

No one has pointed out where any legality in the sales for investment ended, and where any illegality began as it affected any salesmen.

There is nothing whatever in this record or noted by the Court of Appeals disclosing any fact or circumstance warranting an inference that the salesmen knew what the parks cost, what it cost to develop them, expenses etc., or that more money for investment was taken in, than was necessary to develop and sell the Parks.

Here, is another impressive example of what harm resulted to appellants by submitting a mass of exhibits and circumstances to the jury, which were consistent with innocence, even though some may draw an inference of guilt, because harm is presumed where the record does not show affirmatively that he was not harmed.

Kirby vs. U. S., 174 U. S. 47, 55, 56:

> "*The presumption of innocence of an accused* * * * *attends him throughout the trial*, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt."

If that presumption attends the accused throughout the trial then it attends him on a motion for a directed verdict, or a demurrer.

Of what avail is that presumption, if the jury can draw any inference it pleases? How does submitting such circumstances to the jury for their determination

> "lead to the enforcement of that presumption," which "enforcement" the Supreme Court says "lies at the foundation of our Criminal Law."

In a civil case, on a motion for a directed verdict, where an inference can be drawn in favor of the party against whom the verdict is sought, then such party must be given the benefit of the inference. In a criminal case, on a motion for a directed verdict, the rule still operates that the defendant must be given the benefit of the presumption of innocence. The trial Court said in effect,—

The inference must be resolved in favor of the Government, on the basis of the rule that the most favorable construction in favor of the Government must be given on the motion, p. 3380, transcript.

By the Court:

> "On these motions and the demurrer, the evidence must be considered in the light most favorable to the Government."

We never knew, the protection of this presumption was lost in a criminal case, until the defendant, under that principle, is proven guilty beyond a reasonable doubt. We find no authority to sustain that position under the Federal Decisions. It would seem this Court must now rule on that important question, to an accused. Because if this presumption of innocence is neutralized or nullified at any stage of the proceedings, before verdict, the Bench and Bar of the Country should know it. It is not a question in this matter of the Court weighing the evidence, as the trial Court said.

It is a question of the Court applying the law, which it must apply at all stages in favor of an accused.

If the precedents on this question as pointed out in the Circuit Court of Appeals and the Supreme Court control and the presumption of innocence has any force, that statement of the Court as to the unrestrained power of the jury in a criminal case shows the decision is in conflict with the applicable decisions of both courts. It is so important as to call for the revisory powers of this Court.

What the Circuit Court of Appeals had in mind and the basis of the argument of the Government was, that because the appellants did things which (the Court said were legal) and assisted Marshall in raising this money, "*that they must have known* that he did not intend to carry out his agreement." This is clear from the trial court's own statement (p. 3388, Transcript) where the Court showed unmistakably it was applying the rule of civil cases and in

practice, in this case denying defendants the presumption of innocence. But the Circuit Court of Appeals and the United States Courts have said that citizens cannot be convicted in the United States Courts under the presumption of innocence upon any such assumption, *Wolf vs. U. S.*, 238 Fed. 902, 906 (4 C. C. A.). Because there must be evidence of an agreement, which repels the presumption of innocence.

It appears from the decision of the Circuit Court of Appeals in this case that the fundamental error (of approach—at least) is to be found in this:

The Government cannot rely on "acts done which merely aid an unlawful conspiracy or the carrying out of a scheme to defraud (assuming there was one, which must be proved before any evidence of alleged co-conspirators is competent) to establish an agreement either *as to the conspiracy* or *the scheme to defraud*. *U. S. vs. Falcone*, 311 U. S. 205, 207; 25 Mich. 119, relied on by Court in its decision herein; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581, and other cases cited herein on participation and doing acts in furtherance of scheme and conspiracy.

> "In order to constitute due process of law in this matter * * * the indictment must set forth the facts which constitute the alleged transgression, so distinctly, as to enable the accused to prepare his defense." *Fontana vs. U. S.*, 262 Fed. 283, 286.

The offense here basically is, or was, an alleged scheme to defraud, as distinguished from mere fraud or taking money by false representations, as said by this Court, and the using of the mails therefor.

On the admitted facts, under the *Durland* case, 161 U. S. 306, 313, 314, the only "scheme" which could possibly exist, was that Marshall, when he devised the scheme, did not intend to carry it out, or carry out his contracts.

That charge could not be left to intendment or implication, as was done in this case. Pettibone vs. U. S., 148

U. S. 197, 202, 210. The court can search in vain in this indictment for anything for any charge except "that Marshall paid out profits which were not profits and that in some instances investors were paid out of investors' money," a fact, which on the Court of Appeals decision (the salesmen appellants, all having come in long after all plans were conceived and completed) so far as the appellants are concerned, is consistent with innocence, because it is conceded the salesmen had nothing to do with devising the plans in July, 1933, the bookkeeping, banking finance, operation or administration, and that sections were sold at "retail aggregating $1,370,000.00 and $340,000.00 in cash on that amount was taken in by May 18, 1938."

Where then are the facts alleged, constituting an offense, "the alleged transgression" against the salesmen, *under the presumption* of innocence, because the indictment, the United States Court said, must be tested by that presumption. *Fontana* case, *supra.*

Under the presumption of innocence and good faith and honesty the contrary must be presumed. This is especially true since the Court charged the jury (pp. 5332, 5333, Transcript):

> "That the sale of sections in the cemeteries * * * and the taking of the applications by the salesmen and dealers, for the purchase of such sections was *not in and of itself illegal,* * * * nor was it unlawful to execute the documents, by whatever name they may be called—evidencing the right to use such sections for burial of the dead."

The District Attorney at the trial said it was not illegal to sell sections to raise money to develop cemeteries and re-sell them for utility purpose to pay a profit to the investor. (p. 4368, Transcript.)

And since every deed executed at wholesale or retail specifically provided that such section "could be used only for burial purposes" plainly printed.

And since every agreement to resell specifically provided that Forest Glen, Inc., would resell it, as and when

the demand for retail sections enabled Forest Glen, Inc., to resell it.

And since *Government witness O'Brien testified* that the records show *Holcombe* (and this included all salesmen) as such had nothing to do with *the company except as a salesman, "that he had nothing to do with the administrative affairs of Forest Glen, Inc., or the cemeteries."* (p. 2650, 2654, Transcript.)

And since it is conceded that the salesmen had nothing whatever to do with the operation, management, financing, banking, bookkeeping or correspondence of Forest Glen, Inc., or the cemeteries, and were only salesmen and paid only a commission, and did not in fact devise the scheme, whatever it was.

Where then is the circumstance or chain of circumstances which imports an agreement or knowledge or warrants an inference of either an agreement or knowledge, and which shows an open visible connection between the essential fact to be proved, viz:

> "An agreement and knowledge of a scheme to defraud," or
>
> "An agreement and knowledge of a conspiracy with intent to use the mails to carry out the scheme to defraud."

It is apparent, since the Government as pointed out above admits that the record shows wholesale sales aggregating $1,800,000.00 and sales at retail of $1,370,000.00 and that the parks were developed and the 10% was paid into the endowment funds in cash as provided in the contracts.

Therefore, if a *"scheme to defraud existed"* as distinguished from mere fraud as generally known to law, (for the statutory offense necessarily involves "a scheme to defraud") it had to exist under the *Durland* case, 161 U. S. 306, 313, 314, in the mind of Marshall, which requires that there must exist "an intention not to carry out the

contract'' and knowledge that such contract could not possibly be carried out.

It could not exist, where the only circumstances and evidence shows that salesmen are doing what is legal; what they believe they have a right to do and doing things which warrant an inference of innocence under the presumption of innocence.

This Court said a conspiracy cannot be predicated on what appears only to be a lawful act. See *U. S. vs. Beggs*, 211 U. S. 507, 517; *Fain vs. U. S.*, 209 Fed. 525, 531.

Therefore, the scheme must be predicated on the *Durland* case, that is Marshall did not intend to carry out these contracts. That may be the reason the Circuit Court of Appeals found and decided that Marshall alone devised the scheme and laid all the plans, and caused everything to be done before he called in the salesmen. He created the corporations and called in the Trustees first.

This is further strengthened by the statement of the Circuit Court, that the *''project''* not the *''scheme to defraud''* was *similar to the so-called Ponzi case. This case in fairness, on the case made by the Government, could not be likened to that case.* In the *Ponzi* case, Ponzi took money from investors agreeing to double their money by reinvesting in Foreign Exchange. He never invested anything in Foreign Exchange but did pay back double profits, only out of the money paid in by investors. So that Circuit Court of Appeals did have in mind the principle and limitation announced in the *Durland* case, to-wit:

''That there was no intention to carry out the contract.''

In this case everything was admittedly done at least as far as the salesmen could know to carry out the contract.

Retail sales, out of which ultimate profits so-called were said to be paid, aggregated $1,370,000.00 in 4½ years for 14,000 sections and 33,000 remained to be sold.

The investors paid in $1,800,000.00. The cash paid on retail sales as of May 18, 1938, was $340,000.00. The payments on these contracts was by the month. The payments on the wholesale contracts run for 2 to 5 years after May 1938.

That does not show so far as the salesmen are concerned any circumstance showing an open visible connection between that fact and a scheme to defraud and conspiracy or knowledge of either, under the presumption of innocence.

It is also apparent on the record and on the undisputed facts, that very little, if any, contracts were sold after Marion was sold which called for more than 50 or 25% profit on resale or allocation and most of the salesmen did not sell at Marion. Most of them called for 11% profit. But the Court of Appeals is attributing agreements to double the returns to all salesmen, because a few made such contracts.

Where is the circumstance which warrants that inference against the inference of innocence.

It is clear therefore that the decision of the Court of Appeals is in violent conflict with the controlling decisions of this Court and of the Circuit Court of Appeals on questions affecting the fundamental rights and liberties of American citizens.

The Court further in its decision showing how the salesmen have been prejudiced by conditions following the alleged receivership said that Forest Glen Inc., owed investors on May 18, 1938, $2,141,439.00.

Dennis O'Brien, Government expert, in answer to a question by Bigger, said this was "liability to investors and lenders; that this did not take into consideration that payments were due in 1 to 5 or 6 years hence from May 18th, 1938; that he could not tell what amount was only due and payable on May 18, 1938. He could not do this although he had worked on the books for months." (pp. 3270, 3273, Transcript.)

The character of the Court's opinion shows how important it was that the Government be compelled under Article VI of the Amendments to the United States Constitution that each salesman be advised, exactly what it was that was claimed against him. The Demurrers and Motions for Bills of Particulars however were all denied, as alleged in our Petition.

III.

CIRCUIT COURT OF APPEALS RELIED ON FACT APPELLANTS PARTICIPATED IN SECURING APPLICATIONS—FOR RAISING MONEY FOR DEVELOPMENT OF CEMETERIES.

Under the applicable, controlling decisions of the Supreme Court and of the Circuit Courts of Appeals, under a charge of devising a scheme to defraud and the use of the mails, and

Under the charge of a conspiracy to use the mails to carry a scheme to defraud into effect,

Mere participation in doing something which aids and assists in carrying out the plans of those who devised the scheme, or in assisting those in a conspiracy to carry out the object of the conspiracy,

Does not warrant a conviction on either charge.

Neither does it warrant an inference of agreement or knowledge of either.

This must be true under the presumption of innocence "which lies at the foundation of our criminal law."

To warrant such an inference, the act and participation must be such an act as in itself is criminal, because the act itself is made criminal by statute, or

The act of participation must be such as on its face is plainly fraudulent and evidences a corrupt motive, and does not admit of an inference of innocence.

To warrant a conviction on the basis of doing something to further the object of the scheme or of the conspiracy, the *act must be of such a nature* as to import an

agreement. Mere participation does not import agreement. The Supreme Court of the United States and the Circuit Court of Appeals have said, it does not. *U. S. vs. Falcone*, 311 U. S., 205, 207; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581.

The Court of Appeals herein said that those who associate in a scheme to defraud for the purpose of defrauding, who even associate themselves lightly or tacitly with conspirators, or in a scheme to defraud, are guilty, as if it were not necessary that knowledge and agreement must be clearly established beyond a reasonable doubt—under the presumption of innocence, in order to convict.

There must be evidence of an unlawful agreement, into which the accused entered and if he did something, that he did it knowing that unlawful agreement or scheme.

In those cases cited above, the defendant was accused of belonging to a conspiracy, because he sold materials to a defendant who belonged to a conspiracy. The party selling the material knew the material was to be used in the illegal distilling of whisky, but he did not know of any conspiracy or unlawful agreement to manufacture the whisky. The Court held the fact that the accused sold such material knowing how it was to be used, did not import, and did not warrant an inference of, the unlawful agreement or conspiracy.

In the instant case the salesmen were aiding in doing something which was not only lawful but which the Court charged the jury and which the Government conceded was not unlawful in and of itself. So this being legal, there would be less reason here for holding that what the salesmen did imported an unlawful agreement, or warranted a jury drawing an inference of an unlawful agreement or knowledge, to the exclusion of innocence. The act warranting an inference of unlawful agreement must exclude the presumption of innocence.

Where is that circumstance or act in this case as against appellant salesmen. It surely was not stated by the Court

of Appeals. The mere fact that Forest Glen was slow in making payments due to the financial depression of 1937, 1936, a matter of common knowledge, does not warrant such an inference. That slowness of payment is what led the trial court to say "they must have known." But the United States courts said that the failure to carry out a contract does not import a scheme to defraud or a conspiracy, and the courts take judicial notice of a national financial depression.

Therefore, the decision of the Court of Appeals is in violent conflict on this fundamental principle with the applicable decisions of the Supreme Court and the Circuit Court of Appeals and results in suffering prejudicial departure from the applicable established principles of law.

The precedents and decisions of the United States Supreme Court and of the Circuit Court of Appeals require more than this, as is made clear by the decisions of those courts. Acts done which affect the object of a scheme to defraud, or a conspiracy do not establish the agreement in either case, unless the act is itself unlawful, criminal by statute, or imports an agreement to the exclusion of an inference of innocence.

See *Swift & Co. vs. U. S.*, 196 U. S. 375, 396; *U. S. vs. Young*, 232 U. S. 155; *Hammer vs. U. S.*, 134 Fed. 2nd (5th Cir.) 594-595; *U. S. vs. Britton*, 108 U. S. 199; *Joplin vs. U. S.*, 236 U. S.; *U. S. vs. Newton*, 52 Fed. 275, 282; *McKelvey vs. U. S.*, 241 Fed. (C. C. A.) 801, 807, 808; *Vernon vs. U. S.*, 146 Fed. 121, 123, 124 (8th Cir.); *U. S. vs. Falcone*, 311 U. S. 205, 207, 208, 210, 211; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581; *U. S. Santabrey vs. Moore*, see 10 Fed. 2nd 657; *Bebardi vs. U. S.*, 287 U. S. 112, 119; *De Bonaventura vs. U. S.*, 15 Fed. 2nd, 494, 495, 496; *Dickerson vs. U. S.*, 18 Fed. 2nd (8th Cir.) 887; *Linde vs. U. S.*, 13 Fed. 2nd, 59; *Van Tess vs. U. S.*, 292 Fed. 513 (Ohio) 519; 520; *Pelz vs. U. S.*, 54 Fed. 2nd 1001, *Manning vs. Mutual Life Ins. Co.*, 100 U. S. 693, 697, 699.

IV.

THE ADMISSION OF WRITTEN DOCUMENTS—PREJUDICIAL. NO WITNESS ON STAND. VIOLATION 6TH AMENDMENT.

The Court admitted Government's Exhibits 957A to 957V—967C when no witness was on the stand. Objection was made on that ground as violating the 6th Amendment to the United States Constitution. (pp. 3350, 3352, 3353, 3349, Transcript.) None of these were sent through the mails. They were inter-office communications. The manifest purpose was to prejudice one of the appellants, Holcombe.

This was manifest reversible error. It violates a constitutional right. The admission of 967C was indisputably reversible error because the communication was not addressed to Holcombe or written by him. He knew nothing of it. The Government did not attempt to prove any fact stated in that communication by any other witness, although it had the books and could have checked the facts but it did not and the witnesses as to the alleged facts were available but the Government did not call for the books or subpoena any of the witnesses in putting on its case. Miss Bunsford, who is mentioned in the letter was living in Columbus, and had been before the Grand Jury and was available.

The offering, admission and objection to these documents are to pp. 2351, 2350, 2352, 2399, 2401, 2402, 2404, 2412, 2415, 2416, 2417, 2422 to 2425 inclusive, 2428, 2430, 2434, 2444, 2709, 2712, 2713, 2716, 2716A, 2716B, 2716C, 2716D, 2717, 2816, 2817, 2831, 3347, 3349, 3350, 3352, 3353, 3355, 3357.

Government Exhibits 957A to V were admitted on pp. 2827, 2831.

Government Exhibit 967C, a letter from Wm. N. Clark to Marshall, purporting to bind and prejudice Holcombe, no one being on the stand, was offered over objection of

Holcombe citing the Sixth Amendment to the Constitution.

See pp. 3349, 3350, 3352, 3353, 3355, 3356, 3357 and p. 4089 as to Exhibit 967C.

In this connection it must be noted that *every witness, who was an investor, against Holcombe, exonerated him from any misrepresentation. They testified they made their own investigation or by their attorney and relied on such investigations.* The substantial accuracy of this statement will have to be conceded and that his applications and contracts contained substantially whatever statements were made by him. He took one of his prospects to the Head of the Department of Commerce, Ohio. The prospect invested on Benesch's statement—not Holcombe. *In addition, there is no evidence whatever* that a single request made by Holcombe was complied with by Marshall. The Government had witnesses, investors, on the stand mentioned in those communications but failed to examine them on those parts of the communication which the Government claimed as prejudicial. The Government had the books and could have produced them on their own case, to establish whether the requests made by Holcombe were complied with. They did not do that admittedly. This shows the Government was not interested in proving a vital fact beyond a reasonable doubt, but simply endeavoring to prejudice Holcombe. On this point we cite *Reg. vs. Boulton*, 12 Cox Cr. L. C. p. 87, Court Queens Bench.

All this points to the fact that all of these circumstances were consistent with innocence and that presumption should have been enforced by the Court.

It was while these documents were being offered by the Government and admitted by the Court that the Court stated that, statements made in those communications "were not as a fact inconsistent" with innocence, but he was submitting them to the jury to draw the inference of guilt if they chose. This is what took place.

The Court was reading from one of the communications wherein it appeared that Holcombe said if Marshall would make the payments on certain contracts, that it would enable him to make other sales.

The Court said, pp. 2820, 2821, Transcript, "that reflects on knowledge of Holcombe as to whether he knew what was going on."

The following then appears of record, p. 2821, Transcript:

> Bigger, Attorney: "Is there anything wrong in that kind of a statement, is that statement wholly inconsistent with innocence or consistent."
>
> The Court: "If you asked me *as a matter of fact I would say that it was not inconsistent with innocence,* but I am not passing on that fact, *I am simply passing on the law. It looks to me that if the jury felt the man who wrote that kind of a letter had some idea in his mind about how to get more money out of people.* * * *"
>
> Bigger: *"Is there anything wrong with a man trying to make another sale?"*
>
> The Court: *"That is for the jury."*

The Court said *"he was passing on the law." The Enforcement of the Presumption of Innocence is a pure fundamental question of law.* "It lies at the Foundation of our Criminal Law."

Now here appears a forceful, impressive example of what appellants mean.

It is the law as pointed out in the decisions of the Supreme Court and Circuit Court of Appeals, that where the circumstances relied on for conviction are consistent with innocence, even though consistent with guilt, the trial court must direct a verdict of acquittal.

If that be the law, under the presumption of innocence, and the trial court concedes that the circumstance is consistent with innocence, what right has the jury to say that notwithstanding that is a fact, "we will draw an inference of guilt."

Inasmuch as the jury is required to find guilt beyond a reasonable doubt, they should not be given the opportunity to base a finding of guilt on a circumstance, or circumstances, which are conceded by the Court to be consistent with innocence, which admission and situation creates a reasonable doubt in law. This is emphatically true where there is admittedly no direct proof or evidence of an unlawful agreement.

The Trial Court shows by his words that these documents were relied on as competent, material evidence against Holcombe and that it would not enforce that presumption to protect him under circumstances where the Court frankly admits, under law and the decisions of this Court, that he was entitled to have the rule enforced.

The sole reliance against Holcombe for conviction, was based upon these communications under the presumption of innocence because no witness investor testified against him except he took their applications. This exemplifies the plight of these salesmen.

The Jury manifestly drew the very inference of guilt as the Court said it might, although the fact was still consistent with innocence and although "the presumption of innocence still attended him" as stated by the U. S. Supreme Court. This being error, under the decisions of this Court —should require a reversal. (See authorities under Heading II, p. 34, Petition, p. 15 and herein.)

V.

THE EXCLUSION OF TESTIMONY BY THE TRIAL COURT OFFERED BY DEFENDANT—MATERIAL TO ISSUE GOOD FAITH.

The Prosecuting Attorney of Franklin County was called by appellants. He was examined by attorneys for appellants.

He stated he had investigated complaints made about the cemeteries, involved in this cause. The Court refused to permit the testimony to be given and heard before the Jury.

He was fully examined out of the hearing of the Jury.

He testified that "he met Holcombe, one of the appellants, in the Deshler Hotel in April 1936, pp. 4546, 4550, 4551, Transcript; that Holcombe told him he heard he had investigated the cemeteries, that he, Holcombe, was thinking of selling sections in the cemeteries and wanted to know what he had found, that blanket charges had been brought to him that this thing was crooked." (pp. 4547, 4549, Transcript.)

Hoskins answered he had investigated complaints made, put an auditor on the books to find if there was anything crooked, that he could not find where any state laws were violated (p. 4550, Transcript), that he found nothing wrong with the matter legally; that there was no reason why he shouldn't go ahead and sell these lots in this particular organization (p. 4550, Transcript); that this was a personal fight between cemeteries. (pp. 4563, 4547, 4568.) He said Holcombe pressed him on the point whether there was anything wrong about it (p. 4583, Transcript) "I told him it was legal, I hadn't found anything." See pp. 4561, 4573, Transcript, as to Holcombe, pp. 4542, 4587 as to entire examination by other counsel. Exception noted, p. 4568.

The Court by refusing to permit this testimony to go to the jury as a circumstance bearing on the state of mind and the issue of good faith of the defendant Holcombe,

prevented him from establishing the first step in his defense as stated in *Derry's Lessee vs. Gray,* 5 Wall. 795, 808.

The testimony was clearly competent and vital to defendant on the issue of good faith. See 31 *C. J.* Sec. 255, p. 1006, Sec. 257, p. 1010, *Wharton Cr. Ev.* 11th Ed. Vol. 1, Sec. 485; Sec. 96, p. 116; 31 *C. J.* Sec. p. 1003, Sec. 252; *Wigmore Ev.* Vol. 6, Sec. 1789, Sec. 1790, p. 239, Vol. 6.

According to the words in the indictment, the prosecutor was investigating the very claim made by the Government, viz., selling lots under false representations.

Of course we realize, that the scheme to defraud and use of the mails, and conspiracy to use the mails are the offenses charged.

But, the Prosecutor investigated the very thing which the indictment also charges. The Prosecutor investigated it because obtaining property by false pretenses is an offense under the state law, Section 13104, General Code of Ohio.

A reading of the colloquy between Judge Nevin and counsel at the time Hoskins' testimony was under discussion shows not only that Judge Nevin misconceived the real purpose of offering Hoskins' testimony, but also that Judge Nevin clearly misconceived the real character of one of the two elements of the crime charged in this indictment. We quote from Judge Nevin's ruling:

> "Now it is perfectly apparent that Mr. Hoskins whatever question he was examining as prosecuting attorney, he was not examining into the question that is involved in this case. He has already indicated that by his answer, one of his answers, and of course, we know that to be true. He was the prosecuting attorney in the state of Ohio. He had nothing to do with this grand jury, or the grand jury had nothing to do with the Federal statutes—an offense under the Federal law. Under the state law, if I remember it correctly, when I used to be prosecuting attorney—that was 25 years ahead of your time, Mr. Hoskins,—and I think at

present, **the offense is obtaining money or property by false pretenses.''**

It is apparent from that language that Judge Nevin grounded his ruling upon the **supposed** difference between the state law of Ohio and the Federal statutes as well as the ruling that Holcombe alone could testify as to what Hoskins advised him, and informed him on the issue of Good Faith. We will later quote the Ohio statute, but it is sufficient now to say that Judge Nevin correctly stated the matter when he said that under Ohio law ''the offense is obtaining money or property by false pretenses.'' Let us first look to the indictment in this case. Page 2 of the indictment clearly grounds the scheme and artifice upon identically the same offense as is defined by the Ohio statutes. We quote from the indictment.

> ''Unlawfully had devised, and intended to devise, a scheme and artifice to defraud and for **obtaining money and property by means of false and fraudulent representations, pretenses, and promises,** from numerous and sundry persons, too numerous to mention herein * * *''

This indictment was framed under Section 338, Title 18, U. S. C. A. The pertinent part of which is as follows:

> ''Whoever having devised or intended to have devised any scheme or artifice to defraud or **for obtaining money or property by means of false or fraudulent pretenses and** * * *''

If we turn to Section 13104 of the General Code of Ohio, we find that the parallel Ohio statute reads:

> ''Whoever, by false pretense and with intent to defraud, obtains anything of value * * * if the value of the property or instrument so procured * * * is thirty-five dollars or more, shall be imprisoned in the penitentiary * * *''

It will thus be seen that the indictment in this case would have been a good indictment in the state court under Section 13104 G. C. The error of the trial judge in reject-

ing this testimony is clearly and conclusively erroneous and highly prejudicial.

The foregoing description and characterization of the scheme in the first paragraph of the indictment is complete. The subsequent paragraphs in the indictment, fourteen in number, only relate to the details of that scheme and the manner of executing it. Each and every one of those fourteen subsequent lengthy paragraphs must relate back to the first paragraph in which the scheme is described as one to "obtaining money or property by false pretenses."

It is evident from Judge Nevin's other discussion which is too lengthy to incorporate in this brief that except for what he conceived to be a difference between the Ohio and the Federal law that he would have admitted this testimony on the question of intent. It seems conclusive therefore that **he had overlooked the fundamental basis of this indictment and that it is essentially grounded upon acts which would have been an offense under the Ohio law.** This being true it necessarily follows that Hoskins was in a position to give sound advice to Holcombe who had not yet entered upon employment as a salesman, and it would seem that no one in the entire world was in position to give more authoritative advice or advice which would be more convincing to Holcombe that he could enter upon the employment as a salesman without being guilty of **any** offense against **any** law pertaining to fraud whether state or Federal.

We say that Hoskins occupied a key position in this matter because he was not only conversant with state law, but he had just completed an investigation of current rumors that the law was being violated. Hoskins was, therefore, not only a man conversant with the law, but his investigation of the very facts which are the basis of this charge of a fraudulent scheme had just been completed and he had found nothing upon which to base the action of a state grand jury.

To deny Holcombe and appellants the benefit of this testimony of these circumstances was not only prejudicial error, but a denial of due process of law by preventing a defendant from putting on the first step in his defense as stated by the United States Supreme Court in 5 Wall. 795, 808, *supra.*

VI.

THE MOTION AND AFFIDAVIT FOR NEW TRIAL—BASED ON EXTRANEOUS MATTER CONSIDERED BY JURY PREJUDICIAL TO APPELLANTS.

The appellants believe they had a right to a hearing on their Motion for a New Trial upon the grounds of newly discovered evidence. This was filed in the Appellate Court under Rule 11-(3) of the Rules of Practice and Procedure, promulgated by the Supreme Court, October term 1933, 292 U. S. Appendix IV., pursuant to Act of Congress, March 8, 1934, U. S. C. A. Title 28, Sec. 723A—amended.

If the facts set out in the Motion and Affidavit (p. . . . R) filed October 24, 1942 in support of that Motion are true, and the Jury did discuss at length, extraneous matters prejudicial to appellants then under the applicable decisions of this Court they would be entitled to a new trial. That these matters may be inquired into and should be, would appear to be settled by *Mattox vs. U. S.*, 146 U. S. 140, 147. If the jurors did discuss the cost of trying this case and the time it took and the fact that since defendants exercised their constitutional rights and did not take the stand, that they all must be crooks, then certainly the defendants have a right to invoke the protection of the Court. It is possible that since the Government took 5½ months to put on their case, and one defendant took 3 weeks more, that the other defendants felt they might prejudice their case and antagonize the jury, many of whom were farmers, by taking up another 3 months or more and it is possible they were financially exhausted. The transcript as it is involves 5400 pages of trial costing approximately $5000.00.

VII.

THE TRIAL COURT DENIED PERMISSION TO APPELLANTS CROSS EXAMINE MARSHALL.

After Robert Marshall had been examined at great length in his own defense and after being cross examined by the Government for more than ten days, counsel for appellants claimed they ought to cross examine him in their behalf. This was denied by the Trial Judge for reasons set forth in the petition herein.

Since the trial court ruled in effect that Marshall was called by all the defendants and was in effect their witness that may explain why the appellate Court after noting and finding that Marshall devised, planned and executed everything by himself, including what he did before starting the cemetery projects, as well as what happened after May 18, 1938, held that these appellants are bound by what he did, and by what he had in his mind, even though he did not communicate his intentions to them.

The rule, as set forth in the petition herein, declared by the Trial Court was the rule which was actually followed and applied concerning the defendant Marshall. That Marshall's position in this case was radically different from the position of the salesmen is apparent and manifest by this record. It was so found and declared in the opinion of the Court of Appeals because it was stated:

> "While the evidence justified a conclusion of the jury that many of the appellants were guilty of most of the foregoing conduct, and that others participated therein to a much lesser extent, the latter are not thereby exonerated from guilt of the offense charged. In this regard it is to be observed that Marshall may have imposed on some of his own salesmen, and that certain of them may have acted in good faith."

The effect of the ruling of the Trial Court was that each of the appellants would have been bound by any answers made by Marshall to questions propounded by counsel for any of these appellants. We are here concerned with

a general rule of evidence and not by any special rule attempted to be applied to this particular case. Under the rule, declared by the Trial Court, counsel representing other defendants could only examine Marshall by making him their own witness. Any unfavorable answer on his part would be binding upon the defendant, thus interrogating him. Marshall was himself under indictment and like any other co-conspirator would be chiefly concerned with clearing his own skirts, even though it might be at the expense of others who may be indicted with him, but who may be innocent of devising any scheme or entering any conspiracy. Clearly therefore, no co-defendant could afford to take the chance of asking questions, the answers to which might be fatal to his case. The application of the foregoing rule was therefore highly prejudicial to these appellants.

Petitioners therefore believe they have sufficiently demonstrated that the decision of the Circuit Court of Appeals on the face of its own decision alone; not to speak of the record and transcript, is in such violent conflict with the applicable decisions of the Supreme Court and of the United States Circuit Court of Appeals, and the questions involved and rights thereby jeopardized are so important, as to call for a hearing in this Court and the exercise of the revisory powers of this Court to the end that a gross injustice involving the fundamental, constitutional rights and liberties of citizens may be corrected, through the proper channels.

Respectfully submitted,

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Attorneys for Petitioners.

CARRINGTON T. MARSHALL,

Co-Counsel for Willard S. Holcombe.

STRELITZ, DOWLER & WIEDEMANN,

Of Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Circuit Court of Appeals.

Nos. 9241, 9242, 9243.

UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.

No. 9241
E. G. BLUE ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 9242
WILLIAM N. CLARK ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

No. 9243
EARL PARDEE ET AL.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

APPEALS from the District Court of the United States for the Southern District of Ohio, Eastern Division.

Decided October 14, 1943.

Before HICKS, SIMONS, and MCALLISTER, Circuit Judges.

MCALLISTER, Circuit Judge. Appellants were indicted for using the mails in furtherance of a scheme to defraud, and for criminal conspiracy to commit the same offense. Some were convicted on the mail fraud charge; others, on both charges. Numerous errors are claimed, based on erroneous admission of evidence; prejudicial conduct of the

trial court and of the district attorney; abuse of discretion; and denial of motions to quash the indictment, to require a bill of particulars, and for separate trials. It is further claimed that there was no proof of conspiracy or use of the mails in furthering the alleged fraud; that the verdict of the jury was against the weight of the evidence; and, on behalf of certain of the appellants, it is contended that the Statute of Limitations is a complete defense to the claimed illegal acts. As charged by the Government, the fraud consisted of a scheme in which cemetery lots were sold to the public for purposes of investment.

The history of the case commences with the coming of Robert Marshall to Marion, Ohio, in the fall of 1933. Marshall was a former Salvation Army worker and bible salesman, preacher, and graduate of a theological seminary. Before his arrival in Marion, he had been engaged as a sales manager in a cemetery project in which lots had been sold for purposes of interment, as well as for investments. In selling the cemetery lots for investments in that project, purchasers were promised that their money would be doubled. A few months before Marshall came to Marion to organize his cemetery, he left the other project, in which purchasers had been promised double their money back in listing agreements with the cemetery company. At that time, the company was "floundering on the rocks," as Marshall expressed it.

Marshall averred that his purpose in coming to Marion was to undertake the development of a cemetery for the benefit of poor people, whereby they could secure cheap and respectable burial and avoid the potter's field. He denied that he was primarily interested in profit for himself. In order to carry out his purported objective, he took an option on 71.38 acres of land on the outskirts of Marion, at $100 per acre—or a total of $7,138. He then caused two corporations to be organized—Forest Glen Memorial Park Association, a non-profit corporation, and Forest Glen, Incorporated, a corporation for profit. A contract was then entered into between the two corporations, whereby Forest Glen, Inc., was made the exclusive sales agent of Forest Glen Memorial Park Association. By the terms of this contract, Forest Glen, Inc., was to retain 90% of the money received from the public in the sale

of cemetery lots, and was to purchase and improve the property; the remaining 10% was to be paid to Forest Glen Memorial Park Association, as a fund for perpetual care of the cemetery. By the terms of another contract, between Forest Glen, Inc., and Marshall, he was to receive 50% of all money received from sales, for services of supervision and selling expenses.

Within a month after the new cemetery was organized as a corporation, sales of burial lots commenced. In November, 1933, sales at wholesale "for investment," brought in $7,112.68, and deeds for the lots were issued to purchasers, although nothing had yet been paid on the option for the land so sold. In December, 1933, $19,413.74 had been collected in exchange for deeds of cemetery lots; and as yet nothing had been paid on the option. In January, 1934, $35,385.88 had been similarly collected from the public. But at this time, only $2,500 had been paid on the option, and the title to the land was still in the optionor. All of these sales had been to "investors." The first lots sold for burial purposes were in January, 1934, and the total receipts therefrom amounted to $150; and at this time, there had been paid back to the so-called investors, a total of $7,092. As is obvious, these "profits" were paid out of the same money that the public had paid in as investments, there having been no earnings of any kind resulting from the project.

In addition to the first cemetery, Forest Glen Memorial Park Association, there were subsequently formed two more cemeteries—Glen Haven Memorial Park Association, near Springfield, Ohio, and Glen Rest Memorial Estate, near Columbus, Ohio,—and contracts were executed similar to those between Forest Glen Memorial Association, Forest Glen, Inc., and Marshall. All sales, for investment and for "utility," in the three cemeteries, were centered in the office of Forest Glen, Inc., under the management of Robert Marshall.

In explanation of the scheme, Marshall testified that sales of the cemetery lots were made on two plans: for investment, and for "utility"—or for burial purposes. To investors, lots were sold in blocks at a price of $50 per lot. For utility, they were sold for $125 per lot. When lots were sold for investment, Forest Glen, Inc., simultaneously

agreed to resell the lots for the investors at $100 per lot—or 100% profit—within a three-year period; and this was the compelling inducement for purchase, made by the company, acting through Marshall.

Assurance of such returns to investors was allegedly based upon the great profits resulting from sales of individual lots for utility. Out of the sum of $125 per lot, to be received on utility sales, the investor was to be repaid $100, thus doubling his investment and leaving a profit for Forest Glen, Inc. The reason given by Marshall as to why he and his associates agreed to resell the lots to the public for burial purposes at such a great increase in price, was that Forest Glen, Inc., would, from the purchase price paid by the investor, make a pro rata expenditure of $15 per lot, in the building and improvement of the cemetery. Such an expenditure, it was claimed—together with sales energy and supervision—would cause the lot sold at $50 to the investor, to bring $125 on resale. Furthermore, it was insisted by Marshall that such a cemetery lot, after the pro rata expenditure of $15 per lot, would leap in value 10% per year over the retail price.

On May 16, 1938, as a result of legal proceedings, the projects were placed in the hands of trustees, and the operation of Forest Glen, Inc., was ended. Bankruptcy thereafter ensued. It was time. Three cemeteries had actually been built and partially developed. They included structures on the premises, consisting of chime towers, "cathedral lounges," and caretakers' lodges, together with lakes, winding roads, trees, and shrubbery. The total expenditure for purchase and improvement of the cemeteries was $424,365.59. But $1,840,582.81 had been taken from the investors for these projects. Of this amount, $803,950.73 was returned to investors, under the designation of profits, listing fees, premiums, and so on. This resulted in a loss, out of pocket, to investors, as of the above date, of $1,036,432.08 (many of whom were left, however, with great batches of cemetery lots on hand). During the life of the venture, the company had received a total of only $344,568.36 through the sale of lots for burial purposes—and in repaying to investors $803,950.73, had distributed, as profits, $459,382.37 more than had been received from the sales for burial purposes. They were, therefore, repaid

this amount out of the same money which they had paid in for their investment.

As of May 16, 1938, when the trustees were appointed, the perpetual-care funds, into which $130,672.03 was paid, had been reduced by dissipation to $2,117.69 in cash. Accounts payable for cemetery lots, mortgage notes, and odds and ends of other securities, had been deposited when the cash was withdrawn from the perpetual-care funds. The total of such substituted collateral, as carried on the books of the company, was $151,376.44, an undetermined amount of which was worthless. The value of accounts owed Forest Glen, Inc., for lots sold for burial purposes, was appraised at $272,726.68 by Government experts, as of the above date.

On the same date, Forest Glen, Inc., owed its investors $2,141,439.

It had on hand a cash balance of $390.61.

In a sense, the project was similar to the scheme of Ponzi—familiar to the courts, and to all acquainted with the lore and study of criminal fraud—who represented that "he was able to make, within a very short time, 100 per cent on all money intrusted to him, and was generously sharing this astounding profit with investors who should furnish him the money to enable him to do the business on a large scale. * * * His scheme was simply the old fraud of paying the earlier comers profits out of the contributions of the later comers." *Lowell v. Brown (In re Ponzi)*, 280 F. 193, 196 (D. C. Mass.). "He was always insolvent; as time went on he became more and more so, as his business succeeded. * * *" *Cunningham v. Merchants' Nat. Bank (In re Ponzi)*, 4 F. (2d) 25, 26 (C. C. A. 1). The evidence amply sustained the conclusion of the jury that the scheme was fraudulent.

We come, then, to the question of the association of appellants in the project. Necessarily, the scheme called for a large number of salesmen. These were of two classes: salesmen of lots for investment, and salesmen of lots for utility. The chief inducement to the investor was the promise of doubling his money. To instill confidence, and give the impression that such promises could actually be fulfilled, the first investors were paid out of the same money that they had paid into the company. These returns were called

profits, although no sales of burial lots for utility had been made when the first "profits" were paid—and utility sales were the necessary source of profits. Subsequently, cemeteries were built—from a small part of what the investors paid in—and sales of lots for burial purposes were made, followed by interments in the cemeteries.

Marshall, in order to carry out the plan, purchased lists of stockholders, from a number of companies engaged in the business of supplying such lists. These gave the names of Ohio residents, living in the general vicinity of the cemeteries, who had deposits and stocks in building and loan companies, and other corporations. The evidence discloses that various of these lists were placed in the hands of investment salesmen by Marshall. They were also available at the office of the company, for any salesman interested in locating sales prospects.

A great number of the so-called investors were aged persons of no financial or business experience—men whose savings were accumulated through years of toil on farms or in factories, or women who were living on money left to them by deceased husbands.

Investment sales commenced under the "escrow plan," in which 20% of the investment was to be placed in a fund which, together with funds received from the sale of lots for burial purposes, was to be repaid in monthly allotments to the investor, until his money was doubled.

The escrow plan was then followed by the "2% plan," in which 2% per month of the promised return was to be paid monthly to the investor, until he received back his investment and the profit thereon; and all monthly sums so repaid were credited upon the promised returns. Although this was called the "2% plan," it was in reality a repayment of 12% per year on the promised returns, or 24% per year on the original investment.

As payments under this plan became increasingly in default, a third scheme, known as the "6% plan," was used, in which the investor was repaid 6% per year in monthly installments as a premium for listing the property with the company for resale. These payments were in the nature of interest and were not to be charged against the promised returns. After numerous sales had been made under the 6% plan, a further plan, known as the "allocation contract," was devised.

Under the allocation plan, after an investor purchased a section, the company agreed to sell it for him at a profit of from 50 to 100 per cent. The sale for the investor was to be made to the public for burial purposes, or for utility. When such sales were made by the company (for the benefit of investors), 25% of the money received therefrom, was to be allocated to all of the investors in a block or certain area of the cemetery. Other contracts provided for allocations of 15% of utility sales, and others provided that, instead of allocation of receipts from utility sales to investors *in a certain area* from which such utility sales were made, the allocation would be made to *all investors in the entire cemetery*. These printed allocation contracts did not provide for repayment at any specified time; but, when necessary as an inducement in the making of a sale, there were typed into such printed contracts, many various provisions—some agreeing to pay 10% per year on double the investment, together with provisions for substantial monthly payments.

These transactions were further complicated by the giving of promissory notes by the company to a so-called investor, in which it was agreed that it would pay back the amount of the investment, with high interest—the investor to hold deeds to cemetery lots as security for payment of the notes. These note obligation, in themselves, were ordinary borrowings by the company, for which it agreed to pay back the principal sum within a year, together with 25% interest. But such promissory notes appear also to have accompanied by listing contracts, in which the company agreed to pay high premiums to the lender or security holder, for the privilege of reselling the lots; and the notes also appear to have been executed simultaneously with contracts of investment.

Subsequent to the foregoing contracts, there was evolved the contract of conversion to utility, in which the investor who had been promised profits, was induced to exchange his contract for one of outright ownership of lots, on the representation that he could himself sell them for three or four times what he had paid, and keep the entire profits for himself.

In many instances, where payment of the stipulated distributions was in default, and investors were complaining, Forest Glen, Inc., acting through Marshall, would

"pick up" certain lots, apparently repurchasing them from the investor for the company, and repaying to the investor double the amount of the investment. In some cases, the contracts provided for only 50% profit instead of 100%, but the scheme operated in the same manner. The evidence discloses that large sums in cash were obtained by Forest Glen, Inc., and by Marshall and his salesmen, from investors who—although they could not be induced to part with their money on the guarantee and promise of 100% profits and 10% interest—were completely persuaded when they found that, in particular instances, such cash profits seemed to be actually paid by the company, through allocations and "pick ups." Of course, these profits and payments to certain selected investors required only a comparatively small percentage of the cash which was received from the public.

Where an escrow contract was converted to a 2% plan, the amount of periodic payments required to be made by the company would be reduced; and where a 2% plan was converted to a 6% plan, the amount of such periodic payments would be further reduced. However, in the latter case, the ultimate repayment price which was promised, would be increased because the amount repaid thereunder was in the nature of interest and was not to be charged against the principal. When any of the contracts were converted to "utility," the necessity of repayment by the company to the investors was completely eliminated, as the investors then held the lots discharged from any obligation of the company to resell. On all of these plans of sales and conversion, the salesmen were paid commissions by the company. Marshall and appellants were progressively shuffling investors over to the successive contracts in order to diminish the amount of the monthly sums to be repaid; and as a final step, were shifting the ownership of the lots over to the investors, free from the previous obligation to pay high interest and double the investment. When the ramshackle project finally collapsed, many investors were hopefully holding—in the nature of security, or as their own property—huge batches of cemetery lots.

From the evidence, it appears that the salesmen, in numerous instances, had lists of investors in various building and loan companies. The cash values of such investments, at the time, were approximately half their face value,

and regular dividends were not being paid. Salesmen would advise that the investment in question would be worthless, or questionable, and disclose the opportunity of making good on such losses by an investment in cemetery lots. Usually, the salesmen secured their deposit books from such investors, took them to the building and loan companies, and received cash for the deposits, for which cemetery lots were exchanged. Salesmen would then communicate with Marshall, asking that a good distribution of returns be made to a certain investor in order to secure additional money on further sales. In other cases, the salesmen would ask Marshall to pick up a section, or a number of sections, from some investor. This meant that the company would buy back the sections at double the amount paid for them, and thus encourage the investor to believe that his lots were bringing in 100% in profits, in order to promote further sales. At the same time that the company was repurchasing sections at $100 apiece, it was short of cash; in default on its interest payments and monthly installments to investors; and had thousands of sections on hand, which it was desperately trying to sell at $50 apiece.

Appellants were not all accused of the same acts. It is contended that some were guilty of one type of conduct and others of a different kind. Among the acts of various of the appellants, as disclosed by the evidence, were the following: representations that the money invested would be doubled within a three-year period, or some other definite time; representations that the investments were safe —safer than any other type of investment, and safer than insurance; arrangements for the giving of promissory notes by the company, agreeing to pay annual interest of 25% to the lenders; special contracts with certain investors, promising double returns and annual interest of 10% on double the amount of investment; making of numerous other special contracts in which selected investors were promised larger returns than others; successful requests to Marshall to repay cash profits to investors when there were no profits; similar requests that the company repurchase lots from certain investors in order to carry out the deception that the plan actually doubled investments; requests (in order to secure further money from investors and to lure prospective investors) that checks for the promised returns be placed in the hands of salesmen so that

they could personally deliver the checks and have the favorable opportunity of making further sales; arrangements that discriminations be shown in the payment of the promised returns, so that certain investors would be paid large apparent profits, with the object that prospective investors who were watching the [illegible] transactions would invest their money, advising [illegible] circumstances that they would be "let in on favorable [illegible]" on special contracts providing for large income returns; statements that the Government was behind the cemetery projects and that the State had provided the cemetery plan for people who needed income investments; promises to different investors that they would be completely repaid the promised returns within 6 months, 14 months, 16 months, and 20 months; promises to other investors that they would be paid 12%, 16%, 20%, and 25% per annum, in addition to great profits; representations that all the lots had already been sold in certain cemeteries, made for the purpose of persuading prospective investors that the projects were successful and that they might lose the opportunity to profit therefrom; referring prospective investors to others who had invested and were receiving promised returns, at the same time that other investors in like circumstances were receiving nothing whatever; offering to pay certain investors, whose promised returns were long in default, if they would advise prospects that the investment was safe; requests that the company purchase back sections in order to avoid complaints and suspicion; using so-called "sucker lists" to locate investors; unjustified representations that the cemeteries were necessary in the various localities; taking advantage of aged and ignorant, inexperienced men and women; and generally assisting Marshall to secure money by means of agreements to pay huge returns and interest.

Here, it may be remarked, as said by Judge Simons, that "if one sets out to victimize persons least able to guard themselves against fraudulent schemes, * * * the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice." *Norman v. United States*, 100 F. (2d) 905, 907 (C. C. A. 6).

When a scheme to defraud is shared in by two or more, it becomes a conspiracy; the rules of evidence are the same as where a conspiracy is charged [*Robinson v. United*

States, 33 F. (2d) 238 (C. C. A. 9)]; and the act of each party in furthering the common scheme is the act of all. *Davis v. United States,* 12 F. (2d) 253 (C. C. A. 5). If one's intent is to defraud when he joins a dishonest scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing. *Silkworth v. United States,* 10 F. (2d) 711 (C. C. A. 2). Formal agreement is not necessary, it being sufficient if there is an association in the purpose to defraud.

From a review of the record, the evidence of the conduct of appellants and their statements and representations to the investors, warranted a finding that such statements and representations were made pursuant to a general scheme to defraud. Furthermore, the testimony justified the jury in its inferences that there was an understanding between appellants and Marshall, and between each other; that there was a common effort and concert of action on their part in carrying out a fraudulent enterprise; and that they were parties to a scheme to defraud. While the evidence justified a conclusion of the jury that many of the appellants were guilty of most of the foregoing conduct, and that others participated therein to a much lesser extent, the latter are not thereby exonerated from guilt of the offense charged.

In this regard, it is to be observed that Marshall may have imposed on some of his own salesmen, and that certain of them may have acted in good faith. Among those whose complicity, as revealed by the proofs, appears of lesser extent than that of others, may be mentioned appellant McClure. The strongest evidence against him was disclosed with regard to a sale made in 1934 to a railroad switchman. McClure himself was employed, at the time, as a yard carman. Testimony revealed that he represented he had made a careful investigation of the neighborhood of one of the cemeteries, the average number of deaths in the locality, etc., and that the cemetery was "sadly needed"; that the investor would receive returns of 24% per annum, payable monthly, until twice the amount of the investment had been thus repaid. It is somewhat unique to find a railroad yard man in the role of a stock salesman; and it would require some degree of credulity for anyone knowing of his occupation, to rely upon his representations and advice as a financier. Nevertheless, McClure was engaged in the selling

of lots three years subsequent to the foregoing incident, inserting special provisions in contracts, in his own hand, delivering "dividend" checks in persons, and attempting to secure substitution of other contracts for prior agreements. His total commissions amounted to $4,025.16, indicating sales approximating an aggregate of $27,000. Under the facts shown, the question of McClure's guilty association, as well as that of others similarly related to the scheme, was properly submitted to the jury.

Assuming, then, that the evidence sustained the conclusion of the jury that appellants knowingly participated in a scheme to defraud, we come to the question whether they were guilty of using the mails to defraud under § 338, Title 18, U. S. C. A., or of conspiracy so to do under § 88, Title 18, U. S. C. A.

Many cases are cited by appellants to sustain the proposition that, in order to sustain an indictment under the above § 338, it is necessary to prove both fraudulent intent and, also, intent that the mails should be used to promote the fraud. Such cases were decided under §5480 of the Revised Statutes (amended by the Act of March 2, 1889). But this section was thereafter amended and became § 215 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1330, § 338, Title 18, U. S. C. A.). Under the former statute, the elements of the offense were that the persons charged in the indictment must have devised a scheme to draud and intended to effect it by the use of the mails, as well as have used the mails to carry it into effect. The difference between the two statutes is that under the former, the scheme must have contemplated the use of the mails; and under the latter, it is only necessary that a party devised a scheme to defraud and, afterward, placed or caused to be placed a letter in the mails for the purpose of executing the same. *Morris v. United States*, 7 F. (2d) 785 (C. C. A. 8). Under § 215 of the Criminal Code, it is sufficient that, having devised a scheme to defraud, the mails are actually used in effecting it; and a purpose to use the mails is no longer an essential element of the scheme devised, as it was under the former statute. *United States v. Young*, 232 U. S. 155; *Trent et al. v. United States*, 228 F. 648 (C. C. A. 8); *Farmer v. United States*, 223 F. 903 (C. C. A. 2), cert. den. 238 U. S. 638; *Preeman v. United*

States, 244 F. 1 (C. C. A. 7); *Depew et al. v. United States,* 255 F. 539 (C. C. A. 3); *Smith v. United States,* 267 F. 665 (C. C. A. 8); *Bogy v. United States,* 96 F. (2d) 734 (C. C. A. 6); *Guardalibini v. United States,* 128 F. (2d) 984 (C. C. A. 5). It is immaterial whether the persons devising the scheme had intended to use the mails or whether anyone was actually defrauded. The mailing of the letter may be by an innocent agent, unconnected with the schemers. *Stapp et al. v. United States,* 120 F. (2d) 898 (C. C. A. 5). Where a party participating with others in a scheme to defraud, presents a check to a branch bank in effecting the scheme, and it can be reasonably foreseen that the check will pass through the mails to be paid, it is sufficient to charge and show that the fraudulent scheme was one which reasonably contemplated the use of the mails. In such a case, the party presenting the check "causes" the mails to be used in furtherance of a scheme to defraud; and all of those participating in the scheme, being partners in crime, are chargeable with his conduct in the matter; *Hart v. United States,* 112 F. (2d) 128 (C. C. A. 5); and where those connected with a scheme to defraud must have anticipated and known that the mails would be used in its execution as a matter of course, the use of the mails by one or more of the parties in effecting the scheme, becomes the act of each of the co-participants. *Ader v. United States,* 284 F. 13 (C. C. A. 7).

If the use of the mails is such a natural and probable consequence of the execution of the original scheme that all the participants would naturally have foreseen the likelihood that such resort to the mails would be had whenever it appeared expedient so to do in aid of the common purpose, the conclusion would be warranted that they had all consciously participated in bringing about the use of the mails for the purposes stated. Such a bringing about of the use of the mails would be a "causing" of such use, within the intendment of the statute. *Shea v. United States,* 251 F. 440 (C. C. A. 6).

Where a fraudulent scheme is entered into by several parties, and there is evidence from which the jury can properly infer that the use of the mails by one of the defendants was in furtherance of the fraudulent scheme, and that the scheme was in existence prior to the mailing

of the letter, the mailing is, in law, the act of all the defendants. *Tincher v. United States,* 11 F. (2d) 18 (C. C. A. 4). Mere incidental and unpremediated use of the mails in an attempt to defraud, may give federal courts jurisdiction over prosecution for violating the Mail Fraud Statute. All with criminal intent who join themselves even slightly to the principal scheme, are subject to the statute, although they were not parties to the scheme at its inception. *Badders v. United States,* 240 U. S. 391; *Bogy v. United States, supra; Preeman v. United States, supra;* and it is not necessary that the mails be used for communicating with the persons intended to be defrauded. *Preeman v. United States, supra; Ader v. United States, supra.* Use of the mails for the purpose of retaining the fruits of a fraud, or to convey assurances to lull one into inaction, and to postpone, perhaps indefinitely, the taking of action in respect to the fraud, is within the purview of the statute. *United States v. Spielberger,* 28 F. Supp. 380, 382 (D. C. Va.). See *Davis v. United States,* 125 F. (2d) 144 (C. C. A. 6).

There was ample and uncontradicted evidence of use of the mails by both Marshall and a number of the appellants, to sustain the proof required by statute. There was sufficient evidence to sustain the verdict that there was participation by appellants in a scheme to defraud and the use of the mails in furtherance of the scheme, with the provisions of the statute. We shall discuss hereafter certain exceptions, however, with reference to the conviction of some of the appellants.

Having disposed of the question of violation of the mail fraud law, we come to the question of conspiracy to violate the statute.

Conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy. *Morris v. United States, supra.* The conspiracy may be accomplished without mailing a letter; and conspiracies to defraud by use of the mails are generally shown by circumstantial evidence. On a charge of conspiracy to violate the statute, the Government has to sustain a heavier burden of proof as to the intent of the conspirators—not only to defraud, but also to defraud by the use of the mails. *Farmer v. United States, supra.*

Much is said in the briefs of appellants to the effect that the Government does not disclose what the claimed conspiracy consisted of; and that there was no proof of conspiracy or intent to use the mails in furtherance of a fraudulent scheme. The conspiracy consisted of a scheme to defraud people in the sale of cemetery lots. The Government charged not a conspiracy to commit a single act, but a continuing conspiracy to carry on the fraud, coexistent with the duration of the project.

Specific conduct of the eleven appellants found guilty of conspiracy, as disclosed by the evidence for the Government, may be mentioned. Six of them, at various times, wrote letters to Marshall or to his assistant manager, suggesting or asking for special consideration in returns on investments to selected investors; and the Government's evidence shows that all of the appellants convicted of conspiracy represented that the investment in cemetery lots was safe, that the investors could not lose, or—what is, in effect, the same thing—that the investors would double their money or receive returns on their investment with interest of 12%, or 20%, within two, or three, years. Letters were in evidence, written by Marshall to a majority of such appellants, advancing the scheme. He accompanied others in making sales. He wrote letters complimenting investors on the result of their dealings with the conspirators, and sent out letters to all his salesmen from time to time. He was the director of the activity of appellants. They worked through him. The successive sales and conversion of contracts, covering a period of years, resulted from the co-operative efforts of Marshall and appellants. The evidence disclosed repeated relations and sustained association on the part of appellants with Marshall in the continuous course of activity in carrying out the scheme.

As the trial court charged, direct proof of the use of words or an explicit agreement, is not necessary to show conspiracy, which is usually proved by circumstances. Evidence of concerted action may show that persons were acting pursuant to a common understanding among them to violate the law in the manner charged. It is sufficient if one or more persons in any manner, or through any contrivance, come expressly or tacitly, to a mutual under-

standing to accomplish a common and unlawful design. It has been said that the acts of a conspiracy, taken by themselves, are rarely of an unequivocally guilty character and they can only be properly estimated when connected with all the surrounding circumstances. *People v. Saunders,* 25 Mich. 119. When once a conspiracy is shown to exist, which is not ended merely by lapse of time, it continues to exist as to all persons involved until there is shown some affirmative act of withdrawal by persons who attempt to evade responsibility for the acts and declarations of their co-conspirators after the withdrawal. Withdrawal must be evidenced by some act to disavow or defeat the purposes of the conspiracy *Hyde v. United States,* 225 U. S. 347. Here, the scheme continued over a long period of time. In such a case, where the conspiracy is proved, the acts and declarations of one of the conspirators toward the accomplishment of the unlawful scheme, are the acts of all. *Hyde v. United States, supra.* The evidence justified the inferences of the jury that appellants who were convicted of conspiracy knowingly entered upon a scheme to defraud.

With regard to the intent to use the mails, it is the rule that where the accomplishment of the conspiracy contemplated the use of the mails, and such use for the execution of a scheme was essential, intent on the part of the conspirators to use the mails may be inferred [*Oliver v. United States,* 121 F. (2d) 245 (C. C. A. 10)]; and if in the carrying out of the conspiracy, the use of the mails is indispensable, the intent to use the mails as part of the conspiracy is thereby sufficiently shown, and all who participate in the scheme would be guilty of conspiracy to use the mails to defraud, although they might not themselves make use of the mails. *Preeman v. United States, supra.* It is enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails. *Spivey v. United States,* 109 F. (2d) 181 (C. C. A. 5).

The numerous letters, which were introduced in evidence, from Marshall to the investors; the form letters sent by him to the investment salesmen; his individual letters to many of the salesmen, and their correspondence in reply; the large stenographic force which was main-

tained; and the futility, even impossibility, of carrying on thousands of transactions, involving millions of dollars, dealing with hundreds of investors, and employing an army of salesmen, without the use of the mails in assisting in the operation, makes it incredible that all the appellants did not have actual knowledge that the mails were being used to further the scheme. If it appears that a scheme to defraud could not be carried out without the use of the mails, a jury is warranted, without further proof, in drawing inferences that those who participated in the fraud intended so to use the mails. See *Farmer v. United States, supra.* To take one instance only, the manner of operation of the scheme, requiring monthly and periodic checks to be sent out to several hundred investors in various cities, towns, and farming communities, in carrying out the continuing purpose of the project, could well justify the inference that the use of the mails was contemplated as essential and even indispensable in furthering the plan. It could not have been intended that these checks would be personally delivered each month to the investors, nor would that have been possible, unless the salesmen spent all of their time collecting checks at the main office, and then traversing the countryside to deliver them—all without remuneration and without any obligation to do so. That the use of the mails was contemplated, is shown by the requests of salesmen that certain dividend checks be sent to them directly, so that they could make personal delivery to the investors; and one of the chief arguments used in persuading investors to convert to other contracts was that the less frequent payments would result in reducing the expenses of postage.

In any event, it was for the jury to determine whether appellants' intent that the mails should be so used, was sufficiently shown; and the jury was warranted in drawing inferences that appellants were guilty of intent to use the mails in furtherance of the scheme. The evidence sustains the convictions for conspiracy.

However, certain of the convictions for violation of the Mail Fraud Statute call for reversal.

Appellant Secord was a salesman of cemetery lots, not for investment, but for burial purposes. On a certain occasion, he sold space for six graves, for burial purposes, for

$60. At the time the purchaser bought the grave spaces, she also purchased 10 lots for investment, for $500. The circumstances of this sale are somewhat obscure. When Secord sold the grave spaces, he signed the contract as salesman. The transaction took place at the purchaser's home. Secord was apparently accompanied by Jones, an investment salesman. The investment contract was signed by Jones, who wrote in the space provided for the salesman's signature: "Paul Secord, by L. Don Jones." The purchaser testified in regard to the sale for investment: "Q. What did he (Secord) say to you about the return? A. Nothing in particular, only that if I made the investment you see I would receive some funds each month." She then stated that Secord told her that *if a section was sold,* she would receive $75. On cross examination, she testified that Secord told her that she would get her returns as the lots were sold—and that she was to be paid back from the resale of her sections. Secord did not sign the contract, although that, alone, would not negative fraud. There were no representations made by him as to the safety of the investment, or any of the other representations heretofore recited as evidence of fraud. None of the testimony, nor the extensive exhibits and records of the company, show that Secord was ever connected with any other investment sale during his association with the company, over a period of several years. Some years after the above transaction, when the projects had been terminated by legal action, and Marshall desired to procure a hall for a meeting of investors in a certain locality, in order to attempt a resuscitation of his scheme, he apparently communicated with Secord, who wrote him, stating that he had secured a place for the meeting and would contact as many people as he could in order to have a good crowd. He concluded by saying: "It surely will be wonderful if we can get going again." Marshall was represented by himself, and the investment salesmen, as a financial genius. Secord occupied the minor position of a lot salesman, stationed, apparently, at the cemetery. Undoubtedly, he thought it a distinction to perform a requested service for Marshall. Every reasonable inference indicates that Secord's letter referred, not to investment sales, but to his job selling lots for burial purposes (concerning which no fraud is claimed).

He was not engaged in selling anything else during the entire life of the venture. Under all of the circumstances, the evidence was insufficient to support the criminal conviction.

Appellants Stott, Rucker, Cratty, and Willey were convicted of violation of the Mail Fraud Statute, but acquitted on the conspiracy charge. Rucker resigned from the venture by letter in March, 1936, and thereafter had no connection with the project. The testimony disclosed that Stott was not connected in any way with the scheme after April, 1935; Cratty, after July 9, 1936; Willey, after January, 1937. They were convicted on a count setting forth that, in furtherance of the fraudulent scheme, they mailed or caused to be mailed a letter, dated December 31, 1937. They were absolved from all other activity and connection with the scheme within the three-years period of limitations.

It was considered that the above-named appellants could be held as aiders and abetters of violation of the statute. The Mail Fraud Statute is harsh. Participation in a scheme, completely outside the cognizance of federal law, becomes *ipso facto* a federal crime if the mails are subsequently used in its furtherance, even though such use be incidental and without the consent, knowledge, or intent of the participants charged. The use of the mails carries back to the scheme and binds both together in criminal liability. The participation in the scheme cannot be said to link with the use of the mails, if such participation had ceased before the mails were used. To hold that a former participant, who had ended his association with the scheme long before the mails were used, is an aider or abetter in causing the use of the mails in furtherance of the scheme, would be too novel a construction of an already sufficiently extended application of criminal law. We must, therefore, conclude that the evidence does not implicate such appellants at the time when the letter, laid in the count on which they were convicted, was posted. "The crime consists in the posting of the letters (*United States v. Young*, 232 U. S. 155, 161; 34 S. Ct. 303; 58 L. Ed. 548), and if the defendant was not in the scheme when the letters were posted, he was not a principal or an accessory to the crime then committed." *Van Riper v. United States*, 13 F. (2d)

961, 967 (C. C. A. 2). In the cited case, it was held that the evidence did not support a conviction for violation of the Mail Fraud Statute, but that it did support a conviction on a count for conspiracy. In the instant case, the evidence did not implicate appellants in the scheme, at the time when the letter, set forth in the count on which they were convicted, was posted. The only ground for conviction, therefore, was conspiracy; and their acquittal on this count entitled them to a verdict of not guilty. See also *United States v. Foster*, 10 F. (2d) 577 (D. C. Texas).

Error is claimed in the admission of evidence of certain communications made to Marshall, signed by one of the appellants, but not proved to have been sent through the mails. However, evidence that might have been inadmissible on the issue of using the mails to defraud, might properly be admissible as throwing light on the manner of operation of the scheme and relationship of the parties therein, and as proof of intention to defraud. Furthermore, the rule that mere communications between alleged conspirators are not proof of a scheme or conspiracy to use the mails to defraud, is not applicable where such communications are directed to advancing and effecting the conspiracy. A review of the record does not sustain the claim that the admission of evidence of such communications was prejudicial or erroneous.

On the asserted error that the trial court excluded evidence of good faith with regard to a statement made by a prosecuting official to certain of the appellants in reference to an investigation which he had made, it appeared that such inquiry had been directed to ascertaining whether the perpetual-care funds were being misused and not to the nature and operation of the scheme. In any event, there was no semblance of proof that any such statements had influenced appellants. Refusal of the court to grant motions for bills of particulars and separate trials did not constitute error. *Rubio v. United States*, 22 F. (2d) 766 (C. C. A. 9); *Stumbo et al. v. United States*, 90 F. (2d) 828 (C. C. A. 6). We find no merit in the claim of error based upon alleged prejudicial comment and conduct of the trial court. In a jury trial lasting nearly seven months, the trial court was assiduous in protecting the rights of the accused; and it is remarkable that in such a complicated case, no

error is claimed as to any of the court's final instructions to the jury; nor does a review of the record substantiate any of the other claims of reversible error, based upon improper conduct of the trial.

In accordance with the foregoing, the convictions of appellants Secord, Rucker, Stott, Cratty, and Willey are reversed. As to all the other appellants, the judgment is affirmed.

APPENDIX B.

Judgment in Docket No. 9241, Blue, et al. v. U. S.

BEFORE: HICKS, SIMONS AND MCALLISTER, *JJ.*

APPEAL from the District Court of the United States for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause as to Appellant Paul Secord be and the same is hereby reversed. It is further ordered that the judgment as to all other appellants be and is hereby affirmed.

APPENDIX C.

Judgment in Docket No. 9242, Clark, et al. v. U. S.

BEFORE: HICKS, SIMONS AND MCALLISTER, *JJ.*

APPEAL from the District Court of the United States for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause as to Appellants L. A. Cratty and C. O. Willey be and the same is hereby reversed. It is further ordered that the judgment as to all other appellants be and is hereby affirmed.

APPENDIX D.

Judgment in Docket No. 9243, Pardee, et al. v. U. S.

BEFORE: HICKS, SIMONS AND MCALLISTER, *JJ.*

APPEAL from the District Court of the United States for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause as to Appellants G. F. Stott and William L. Rucker be and the same is hereby reversed. It is further ordered that the judgment as to all other Appellants be and is hereby affirmed.

APPENDIX E.

Order Denying Petitions for Rehearing, Docket Nos. 9241, 9242 and 9243.

(Entered February 9, 1944 by Thomas F. McAllister, Circuit Judge.)

BEFORE: HICKS, SIMONS AND MCALLISTER, *Circuit Judges.*

Appellants' petitions for rehearing include, among other grounds, a challenge to the correctness of facts recited in the opinion. Since many statements in the petitions consist of unqualified denials that there was any proof to support such recitals, and because of the extensive record, comprising approximately 5700 typewritten pages, it is deemed proper, in view of apparently honest misapprehension of counsel, to dispose seriatim of the principal challenges in this regard, for guidance in any further proceedings in the case.

It is stated that there is no proof to sustain the recital that statements were made by salesmen that the Government was behind the cemetery projects and that the State had provided the cemetery plan for people who needed income investments. A review of the testimony in the record, verifies the correctness of the challenged recital in the opinion.[1] Furthermore, it is claimed that the reference in the opinion to the fact that lots were sold for utility purposes at $125 per lot is not true nor supported by the evidence. While the foregoing matter was only referred to, in describing the scheme in general, and a misstatement of the kind alleged would be of no consequence in the determination of the issues, this claim of appellants, upon an examination of the record, is also found to be without foundation.[2] As to assets in the perpetual-care funds, the Pumphrey note was, from all the evidence in the case, worthless; and, in any event, such an item would be neither important nor controlling in consideration of a petition for rehearing. With regard to the statement that appellant Blue did not work for Forest Glen after June 9, 1936, and that, therefore, his

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[1] Record—pp. 1717, 2947, 2960.

[2] *Id.*—pp. 3621, 3944, 3971, 4196, 4229, 4301.

conviction should be reversed, as in the case of certain other appellants, it may be said that, as distinguished from the showing with reference to appellants whose convictions were reversed, there was no evidence that Blue's connection with the enterprise ever ceased prior to indictment; and it is not incumbent upon the court, on this question, to search the record to establish the date of his latest association with the scheme. It may be remarked, however, that the statement in the petition for rehearing as to his last connection with the venture, is erroneous, inasmuch as it clearly appears he was associated in the sale of lots for investment as late as, approximately, the first of November, 1937.[3] The law in presumption of innocence and burden of proof was properly submitted to the jury by the trial court. Questions with regard to the propriety of inferences to be drawn by the jury from the evidence, are disposed of in the opinion heretofore rendered. Other complaints and arguments suggested by counsel are not meritorious. Affidavits and a motion filed subsequent to the petitions herein, have been considered, and do not warrant any change in our determination.

The Government's petition for rehearing is founded upon arguments already passed upon in the opinion.

The petitions for rehearing filed on behalf of the appellants and the Government are denied.

Approved for entry.

(Signed) THOMAS F. MCALLISTER,
United States Circuit Judge.

Filed: Feb. 9th, 1944.

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[3] *Id.*—p. 294.

APPENDIX F.

A. Pertinent Provisions of the United States Constitution.

Article I. Section 10.

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Amendment V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Acts of Congress.

U. S. C. A. TITLE 18, SECTION 88; FORMERLY R. S. 5440; CR. CODE SEC. 37.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

U. S. C. A. TITLE 18, SECTION 338. FORMERLY SEC. 215 CR. CODE; R. S. 5480.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or any state, territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any

other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

The following section is claimed by the government to be applicable.

PRINCIPALS.

SEC. 550. CR. CODE 332.

Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal. (R. S. 5223, 5427; March 4, 1909, C321. Sec. 332, 35 Stat. 1152.)

C. Sections of the General Code of Ohio.

Relating to cemetery associations, cemeteries, graveyards, sale of the same for profit and exemption from taxation. In force at time complained of herein.

GENERAL CODE SEC. 5350, GRAVEYARDS.

Lands used exclusively as graveyards or grounds for burying the dead, except such as are held by a person, company or association with a view to profit, or for the purpose of speculating in the sale of, shall be exempt from taxation. (R. S. 2732, 99 O. L. 449; 91 O. L. 393, 216; 88 O. L. 39, Sec. 3; S. and S. 761; S. and C. 1440.)

APR 10 1944

Nos. 789–791

In the Supreme Court of the United States

October Term, 1943

E. G. Bilbo et al., William N. Clark et al., and Parnell et al., Petitioners

v.

United States of America

ON MOTIONS FOR LEAVE TO AMEND OR SUPPLEMENT RECORD AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Argument	14
Conclusion	21
Appendix	22

CITATIONS

Cases:	
Clyde Mattox v. *United States*, 146 U. S. 140	21
Daniels v. *United States*, 17 F. (2d) 339, certiorari denied, 274 U. S. 744	15
Davis v. *United States*, 47 F. (2d) 1071, certiorari denied, 284 U. S. 646	21
Delaney v. *United States*, 263 U. S. 586	18
Grell v. *United States*, 112 F. (2d) 861	15
Hawley v. *United States*, 133 F. (2d) 966	15
Hyde v. *United States*, 225 U. S. 347	21
Jordon v. *United States*, 87 F. (2d) 64, certiorari denied, 303 U. S. 654	21
Mattox v. *United States*, 156 U. S. 237	17
Pietch v. *United States*, 110 F. (2d) 817, certiorari denied, 310 U. S. 648	15
Robinson v. *United States*, 33 F. (2d) 238	18
Salinger v. *United States*, 272 U. S. 542	17
United States v. *Beck*, 118 F. (2d) 178, certiorari denied, 313 U. S. 587	15
United States v. *Leathers*, 135 F. (2d) 507	15, 17
Wiborg v. *United States*, 163 U. S. 632	18
Williams v. *United States*, 3 F. (2d) 933	21
Statutes:	
Criminal Code:	
Sec. 37 (18 U. S. C. 88)	4
Sec. 215 (18 U. S. C. 338)	3

581509—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 789–791

E. G. BLUE ET AL., WILLIAM N. CLARK ET AL., EARL PARDEE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD AND ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (Pet. 70–90)[1] is reported at 138 F. (2d) 351. The opinion denying petitions for rehearing (Pet. 93–94) has not yet been reported. The opinion of the district court denying defendants' motions for a directed verdict appears at pages 3375–3394 of the transcript of testimony.

[1] The circuit court of appeals proceedings are filed with this Court as a separate document but are not paginated.

JURISDICTION

The judgments of the circuit court of appeals (Pet. 91–92) were entered on October 14, 1943, and petitions for rehearing were denied on February 9, 1944 (Pet. 93–94). The petition for writs of certiorari was filed March 14, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence as to petitioners, who were salesmen engaged in the promotion of the sale of cemetery lots for investment purposes, is sufficient to support their convictions under the mail fraud and conspiracy statutes.

2. Whether the fact that the trial of 36 defendants extended over a period of six months was a denial of petitioners' constitutional rights to a speedy trial.

3. Whether the admission of documents signed by petitioners which were taken from the correspondence files of a bankrupt corporation constituted a violation of petitioners' constitutional rights.

4. Whether it was prejudicial error to exclude proffered testimony of a state prosecutor that he had told petitioner Holcombe, before the latter accepted employment as a salesman with the

cemetery project, that he had found nothing wrong with the project, no proof having been offered that such statement influenced Holcombe's conduct.

5. Whether petitioners were improperly denied an opportunity to cross-examine a codefendant, the instigator of the project, who took the stand in his own behalf.

6. Whether the circuit court of appeals erred in refusing to remand the case in order to afford petitioners an opportunity to make a motion for a new trial on the basis of affidavits stating on information and belief that the jury had taken into consideration the failure of petitioners to take the stand in their own behalf, and other extraneous circumstances.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof,

> or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioners and others, 36 in all,[2] were tried in the United States District Court for the Southern District of Ohio, on a ten-count indictment

[2] The indictment named 44 defendants, but several entered pleas of guilty or *nolo contendere* and others died before trial.

charging use of the mails in the execution of a scheme to defraud and conspiracy so to use the mails (R. 1–22).[3] In substance, the scheme set forth in the indictment was one to acquire tracts of land and to organize corporations to develop such tracts as cemeteries and to sell sections therein to the public for investment purposes; to represent to prospective investors that there was a large unfilled demand for cemetery lots and guarantee to the investors profits of from twenty-five to one hundred percent under numerous different forms of contracts, the profits allegedly to result from the advance prices at which individual lots would be sold for burial purposes (R. 1–11).

The evidence for the Government may be summarized as follows:

In October 1933 the defendant Robert Marshall secured an option on 71 acres of land in Marion County, Ohio, and organized two corporations, Forest Glen, Inc., a profit corporation, and Forest Glen Memorial Park Association, a nonprofit corporation. Forest Glen, Inc., was made the exclusive sales agent of the association, with the right to retain 90% of the moneys secured from the sale of cemetery lots, out of which it was to purchase and improve the property. The remain-

[3] The designation "R." refers to the transcript of the proceedings in the district court. The designation "Tr." refers to the typewritten stenographic transcript of the testimony at the trial.

ing 10% was to be paid to the association as a perpetual care fund (Tr. 2477). In 1934 and 1936 two other nonprofit corporations were formed—Glen Haven Memorial Park Association near Springfield, Ohio, and Glen Rest Memorial Estate near Columbus, Ohio. These corporations made similar arrangements with Forest Glen, Inc., with respect to the sale and improvement of cemeteries (Tr. 2033, 3153). Forest Glen, Inc., in turn entered into a contract with Robert Marshall whereby he was to receive 50% of the money obtained through the sale of lots, for his services in superintending the development of the cemeteries and for payment of agents' commissions and promotional expenses (Tr. 2477, 2547, 2570). In 1937 a new company known as Robert Marshall, Inc., was incorporated, allegedly to assure the continuance of Marshall's genius as a promoter, and it took over Marshall's contract with Forest Glen, Inc. (Tr. 2033, 2561, 2570). Stock in this Corporation was sold to investors (Tr. 2564–2566).

Prospective investors in the cemetery properties were obtained from lists of persons owning shares in various building and loan associations, the assets of which had at the time been frozen. Salesmen would persuade the investors to cash in their shares, currently valued at about one-half of their face amount, and invest the money so received through Forest Glen, Inc., in order to recoup their losses. Investors were guaranteed 100% and later 50% profit, upon representa-

tions that the retail prices of the lots for burial purposes would exceed by at least that much the wholesale prices paid by them (see *infra*, pp. 9–12).

By November 1933, one month after Forest Glen, Inc., was organized and before Marshall had exercised his option to purchase the Marion County land, sales of lots for investment purposes totaled over $7,000 (Tr. 2478). By January 1934, $19,413.74 had been received from investment sales, but only $2,500 had been paid on the land and title was still in the original vendor (Tr. 2478–2479). At that time only $150 had been received for lots sold for burial purposes, yet $7,092 had been paid back to the original investors in the form of returns on their investments (R. 2480, 2483). Thus, from its inception the project was able to exist only by paying to early investors part of the money received from the later ones (Tr. 2483, 2541–2542).

From October 1933 to April 1934 investment sales were made under the so-called escrow plan whereby 20% of the investment was to be placed in a fund which, together with moneys received from the sale of the lots for burial purposes, was to be repaid to the investor in monthly allotments until his original investment was doubled (Tr. 2499–2500). Subsequently, various other plans were devised whereby investors would be promised regular payments on the lots, first in the form of interest plus payments of principal,

and then later merely of interest alone. Still later investors were induced to exchange their contracts for outright ownership of the lots on the representation that the investors could then sell the lots themselves and make more than 100% profit. Forest Glen, Inc., however, continued to "pick up," i. e., repurchase, lots from a few investors at 50% or 100% profit so that there were always a few investors who received the promised profit (Tr. 2494, 2499, 2501–2512, 2524–2526, 2640–2641).

The project continued until May 1938 when, as the result of state court litigation, new trustees of the cemetery associations were appointed. Forest Glen, Inc., was adjudged a bankrupt in June 1939 (Tr. 2777). As of May 1938, $1,840,582.81 had been received from the investing public and only $424,365.59 had been spent to improve the cemeteries. Sales of lots for burial purposes had realized a total of $344,568.36, but $803,950.73 had been paid to the investors. The perpetual care funds, to which there had been allotted $130,672.03, consisted of only $2,117.69 in cash; collateral in the form of accounts receivable for lots, mortgage notes, and other securities had been substituted for cash (Tr. 2326–2328, 2487, 2490, 2497, 2530–2536, 2545). There had been paid to Robert Marshall and Robert Marshall, Inc., the sum of $748,209.44 out of which salesmen and sales managers had received $574,653.48 (Tr. 2349, 2546, 2549).

The fifteen petitioners were all salesmen engaged in promoting the sales of lots for investment. Three of them—Clark, Holliday, and Reinwald were officers of Robert Marshall, Inc. (Tr. 2562) and apparently acted in an administrative capacity in Forest Glen Inc.[4] Their total commissions for the period up to May 16, 1938, amounted to $69,461.60, $24,244.89, and $54,809.64, respectively (Tr. 2548–2549). The evidence against the other twelve, as well as against these three, consisted for the most part of the testimony of persons who had been induced by them to invest money in the enterprise.[5] This testimony follows a consistent pattern.

Almost all were old people, many of them widows, who had invested all or part of their savings in building and loan shares. They were solicited by one or more of the petitioners and

[4] Clark assisted some of the other salesmen in making sales (Tr. 68–76, 2836–2848) and his correspondence with Robert Marshall (Exhibit 967A–K, Tr. 2404–2416) indicates that other salesmen reported to him. Holliday was active in mollifying investors who complained about not receiving payments and inducing them to accept "conversion" of their contracts to new agreements providing for lower payments (Tr. 289–291, 831–836, 918–920, 951–952, 1100–1104, 3118–3120). He inspired confidence because he had formerly been a preacher (Tr. 1102). Reinwald was financial manager of Forest Glen, Inc. (Tr. 2677) and assisted other salesmen in effecting sales or conversions of the contracts (Tr. 337, 1248–1249, 2773–2777, 2304–2305).

[5] For the convenience of the Court we summarize in the Appendix *infra*, pp. 22–24, the names of the persons as to whom the record shows petitioner had transactions, the amounts invested, and the amounts given as returns.

assured that investment in the cemetery project would enable them to double their money [6] or, later, that they would receive large returns on their investment.[7] Prospective investors were told that an investment in the cemetery project was safe or wise;[8] that an investigation of the surrounding area had revealed great need for a cemetery;[9] that the Government was backing the project.[10] Some of the salesmen implied that no returns would be received from building and loan shares [11] or that other investments were "shaky." [12] Investors were even promised that their lots would be repurchased whenever the money was needed.[13] When the two later corporations were organized several salesmen told prospects that the original Marion cemetery was very successful, that no more sections therein were available, and that the earlier investors were being paid regularly.[14]

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[6] Blue—Tr. 286–287, 319–325, 2905–2907; Malott—Tr. 329–332, 342–343; Neidigh—1752; Riggle—2989–2991; Clark—56, 1537.

[7] Berry and Deck—Tr. 226–233, 1091–1092, 1194–1196; Buck—Tr. 565, 663–668, 1994, 2073; Marshall—Tr. 7; Pardee—Tr. 903; Holcombe—Tr. 3100.

[8] Benman—Tr. 2067; Buck—Tr. 672–673; Holcombe—Tr. 2145–2148; Marshall—Tr. 7; Neidigh—Tr. 2955; Pardee—Tr. 897–899, 1889; Reinwald—Tr. 337, 2917–2921, 2276.

[9] McClure—Tr. 1374–1375; Malott—Tr. 329–332.

[10] Neidigh—Tr. 2945, 2947, 2960; Reinwald—Tr. 1715–1717, 3141–3147.

[11] Buck—Tr. 1993; Riggle—Tr. 2989–2991.

[12] Pardee—Tr. 897.

[13] Blue—Tr. 1177–1179; Clark—Tr. 1545.

[14] Benman—Tr. 2069; Buck—Tr. 2073; Clark—Tr. 66; Riggle—Tr. 2995–2996.

In some instances, investors testified that they thought they were getting lots in one cemetery and found them to be in another, or thought they were getting lots in the improved portion and found them in the unimproved.[15] After a first investment had been made the salesmen would then endeavor and often succeed in persuading the customer to make additional investments.[16] Frequently returns were paid on the original investments as a means of obtaining more of the customers' money.[17] Subsequently the investors would be persuaded to "convert" the contracts to outright ownership of the sections or to contracts

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[15] Blue—Tr. 311–315; Berry and Deck—Tr. 1203; Holliday—Tr. 3121–3124.

[16] Benman—370–371; Blue—1177–1179, 2910–2915; Berry and Deck—1080; Buck—504–520, 663–672, 2070–2089, 1990–2006; Clark—1897–1944, 2843–2848; Holcombe—3093–3103, 2263, 2175–2178; Holliday—918–920, 289–291, 951–952; Malott—333–335, 1238–1240, 1282–1285; Marshall—2293, 2110–2114; Neidigh—2950–2953; Pardee—2131–2138; Reinwald—2922–2926; Riggle—2187–2188.

[17] Clark—Ex. 967A–K, Tr. 2404–2416—Holcombe—Ex. 957A, D, H, J, K, Tr. 2831; Holliday—Ex. 962A, B, Tr. 2421, 2428; Marshall—Ex. 5286, Tr. 4850–4851; Pardee—Ex. 958A, Tr. 2402; Riggle—Ex. 959A, Tr. 2402.

Petitioner Benman told an investor who applied to him for a position as salesman that it was "hard to take peopel's money away from them after they had saved all their lives if you have not had any experience" (Tr. 360–361). During the course of the state litigation which resulted in the appointment of new trustees, *supra*, p. 8, Pardee and Buck called upon investors and asked them to contribute funds for attorneys' fees in order to enable the investors to regain control of the cemeteries (Buck—Tr. 672–675; Pardee—Tr. 401, 1255–1257, 1287, 1694–1697, 1764–1766).

providing for lesser benefits,[18] often on the representation that the new contract was a better one.[19] The various petitioners did not all make the same misrepresentations, but each made untrue statements along the same general line. See notes 6–15, *supra.*

In the files of Forest Glen Inc. there were found letters from a number of petitioners to Marshall or Reinwald which reveal that these petitioners were aware that payments to investors were not made regularly and that further investments could be procured if the promises to some investors were occasionally met. See note 17, *supra.*

In submitting the case to the jury the judge charged that, although a defendant might be convicted on circumstantial evidence, the circumstances must point so surely and unerringly to guilt as to exclude every reasonable hypothesis of innocence (Tr. 5309–5310); that it was necessary for the jury to find as to each of the defendants that there was a scheme to defraud, a purpose to mislead, an intention to obtain money or property by means of false pretenses, representations, or promises, and that the mails were used in execution of the scheme (Tr. 5325). He

[18] Blue—Tr. 1177–1179, 2915–2918; Buck—Tr. 663–672; Clark—Tr. 76, 1545, 2862–2863; Deck—Tr. 759–760, 981–982; Holliday—Tr. 289–291, 831–836, 951–952, 1101–1104; Malott—Tr. 335–336; Marshall—Tr. 2298–2302; Reinwald—Tr. 3015–3030.

[19] Holliday—Tr. 1102, 831–836; Malott—335–336.

specifically instructed the jury that it was for them to determine whether defendants made representations and promises with honest belief in their truth and that, if any defendant did have such honest belief, he was not guilty no matter how visionary the scheme might seem (Tr. 5328, 5331, 5334); that the sale of cemetery lots for investment purposes and the execution of contracts in connection therewith was not in itself unlawful but that the jury might find defendants guilty if they used such means as the vehicle of a scheme to defraud (Tr. 5332–5333); that they must find that each of the defendants knew the purposes and objectives of the alleged scheme to defraud and that they identified themselves with it with the intent of furthering its unlawful purpose (Tr. 5330; see also Tr. 5339). No objection was made to the judge's charge (Tr. 5347).

All of the petitioners, except Blue, Berry, McClure, and Neidigh were found guilty on all ten counts and sentenced to imprisonment for terms varying from three to six years and to pay fines of $1,000 each. The four above-mentioned petitioners were found guilty on the first count and sentenced to terms of either one year or eighteen months and to pay fines of $1,000 each (R. 262–271, 281–284, 291, 296). On appeal, the judgment as to each petitioner was affirmed (Pet. 91–92).[20]

[20] Thirty-three defendants were found guilty on one or more counts. Marshall died a few days after the verdict was returned. Of the twenty defendants who appealed to

ARGUMENT

1. Petitioners do not argue that the evidence was insufficient to establish a scheme to defraud or the use of the mails in the execution thereof. They contend merely (Pet. 12–13, 14–15, 16–17, 26–28, 34–58) that the proof was insufficient to establish that they knowingly participated in the scheme to defraud. While no one particular fact may in itself be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury, which were sustained by the district court and the circuit court of appeals, that petitioners were all implicated in the fraud. The untrue representations made by every one of the petitioners (see pp. 9–12, *supra,* pp. 22–24, *infra*), the multifarious contracts, many of them modified to suit individual cases, the age and stations in life of the victims and their obvious lack of comprehension of the intricacies of the agreements which they signed, the consistent attempts to obtain further investments after a few payments had been made on prior contracts, all warrant the conclusion that these salesmen went

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the circuit court of appeals, the convictions of five were reversed, one on the ground that the evidence was insufficient to show the defendant's participation in the investment part of the scheme, and four on the ground that the defendants had terminated their connections with the organization before the mailing of the letter which formed the basis of the count of the indictment on which they were found guilty (Pet. 87–88).

beyond legitimate selling activities [21] and engaged in a deliberate effort to defraud the aged and the credulous. The issue of petitioners' guilt was, therefore, a question for the jury. Cf. *United States* v. *Leathers,* 135 F. (2d) 507, 511–512 (C. C. A. 2); *Hawley* v. *United States,* 133 F. (2d) 966, 970 (C. C. A. 10); *Grell* v. *United States,* 112 F. (2d) 861, 870 (C. C. A. 8); *Pietch* v. *United States,* 110 F. (2d) 817, 820 (C. C. A. 10), certiorari denied, 310 U. S. 648. A similar situation was before the Seventh Circuit in *United States* v. *Beck,* 118 F. (2d) 178 (C. C. A. 7), certiorari denied, 313 U. S. 587, where the court upheld the convictions of both principals and salesmen who were engaged in promoting a comparable scheme for the sale of cemetery lots.

2. Petitioners contend (Pet. 13, 17–18, 27, 29–34) that they were deprived of their constitutional right to a speedy trial. Inasmuch as their counsel agreed to the limitation of trial sessions to four hours a day (see Pet. 29–30), they are in no position to complain of this procedure. Cf. *Daniels* v. *United States,* 17 F. (2d) 339, 343–344 (C. C. A. 9), certiorari denied, 274 U. S. 744. It is true that petitioners did voice an objection to the shortened sessions after most of the Government's case was in (see Pet. 30–32), and that at that time the court ruled that it would

[21] The trial court charged the jury that it was to distinguish between mere "puffing" and deliberate misrepresentation (Tr. 5328).

continue to have only morning sessions until the close of the Government's case, but the court stated that when the defense presented its case it would agree to whatever hours defense counsel wished (Tr. 2311–2313). Although the trial extended over a period of approximately six months, there was no undue delay. The trial involved a complex scheme extending over a period of about five years. Thirty-six defendants were on trial, and their individual participation in the scheme could only be shown by the testimony of their victims. Almost all of these witnesses were old people, several of them were hard of hearing, and many had difficulty in understanding the questions put to them. Most of them were cross-examined by more than one defense counsel. Under the circumstances, a lengthy trial was inevitable.

3. Petitioner Holcombe objects (Pet. 16, 28, 59–62) to the admission in evidence of letters written by him to Robert Marshall on the ground that no witness was on the stand when they were admitted in evidence. These letters had been taken from the files of Forest Glen, Inc., most of them were produced before the grand jury by the trustee in bankruptcy of that company, and all were identified at the trial by an inspector of the Post Office Department who had held them in his custody (Tr. 2323–2324, 2399–2402, 2460–2461). While the inspector was not on the stand at the

time the letters were actually admitted (Tr. 2831), Holcombe's attorney did not question the genuineness of the documents and expressly admitted that the signatures were Holcombe's (Tr. 2712–2713). The letters, some of which are referred to in the Statement, *supra,* p. 11, had considerable probative value as indicating that Holcombe knew that payments were not made regularly on the contracts and that the practice of repurchasing some lots was merely a means of inducing further large investments. The letters were obviously competent evidence and their admission did not, as petitioners contend, contravene the right to confrontation of witnesses guaranteed by the Sixth Amendment. Cf. *Salinger* v. *United States,* 272 U. S. 542, 548; *Mattox* v. *United States,* 156 U. S. 237, 242; *United States* v. *Leathers,* 135 F. (2d) 507, 511 (C. C. A. 2).

Holcombe also complains (Pet. 59–60) of the introduction of Government's Exhibit 967C, a letter from petitioner Clark to Robert Marshall taken from the files of Forest Glen, Inc., in which Clark referred to Holcombe's report to him of an interview with a prospective investor who had agreed to make additional investments if two of her sections were repurchased. The trial judge limited the consideration of this letter, insofar as it implicated Holcombe, to the tenth count charging conspiracy (Tr. 3356). This instruction was actually more favorable to Holcombe than

the law required, since the court might well have held the evidence applicable to all counts on the theory that a scheme to defraud, when shared by several persons, is itself a conspiracy.[7] On the conspiracy count it was clearly admissible against all defendants as a statement made by a co-conspirator in furtherance of the conspiracy (*Delaney* v. *United States,* 263 U. S. 586, 590; *Wiborg* v. *United States,* 163 U. S. 632, 657).

4. Petitioner Holcombe also contends (Pet. 14, 19–20, 27, 63–67) that the trial court erred in excluding proffered testimony by a state prosecuting attorney that in 1936 he had investigated complaints that Forest Glen, Inc. was not putting into improvements of the cemeteries the proportion of the money received from sales which it advertised, and that he had had an auditor investigate the books of the corporation and had found no basis for action (Tr. 4546–4570). The witness was originally called on Robert Marshall's behalf (Tr. 4562), but on preliminary examination outside of the presence of the jury, he revealed that in an accidental meeting with Holcombe in 1936 the latter had asked him about his investigation and that he had told Holcombe that he had found nothing wrong. Holcombe's attorney then offered to present this testimony to the jury on Holcombe's behalf (Tr. 4547–4550, 4561–4573). The trial court excluded the testi-

[7] *Robinson* v. *United States,* 33 F. (2d) 238, 240 (C. C. A. 9).

mony on the grounds that it would raise a collateral issue as to the nature of the state prosecutor's investigation, which related to a charge of an offense materially different than that charged in the indictment (Tr. 4555), and that testimony would not reveal the effect of the prosecutor's statement on Holcombe's state of mind (Tr. 4570). The prosecutor's conversation with Holcombe occurred before Holcombe accepted employment with Forest Glen, Inc., whereas the evidence to sustain Holcombe's conviction consisted of his acts and statements after he had accepted such employment (see *supra,* pp. 9–12). As the Circuit Court of Appeals stated, no proof was offered that the conversation with the prosecutor influenced Holcombe in accepting the employment. Even if it did, it would not serve to condone his later conduct. Hence, even assuming that the proffered testimony had some relevance as to Holcombe's motive in originally accepting the employment, its exclusion could not have been prejudicial.

5. There is no merit in the contention (Pet. 19–20, 68–69) that petitioners were improperly denied an opportunity to cross-examine the defendant Robert Marshall when he took the stand in his own behalf. Early in the presentation of the defense, after Marshall had given some testimony and while an intervening witness was on the stand, the trial judge ruled (Tr. 4456) that any witness called on behalf of one defendant might

be examined by counsel for any of the other defendants as a defense witness, and that if such counsel stated that the witness was hostile or represented conflicting interests, he would then determine whether to permit counsel to cross-examine the witness. Counsel for Holcombe stated that he had intended to cross-examine Marshall, but that after talking to Marshall he had concluded that Marshall was in no condition to testify and that he had therefore abandoned the plan (Tr. 4458). None of the other defense counsel sought to cross-examine Marshall. Hence, there was no occasion for the judge to rule as to the right of any of the petitioners to cross-examine him.[8]

6. After the notices of appeal had been filed, some of the petitioners filed a motion in the circuit court of appeals seeking to have the case remanded to the district court to permit them to file a motion for a new trial.[9] The motion for remand was based upon an affidavit of those petitioners that they had been informed and believed that the jurors had taken into consideration in arriving at their verdict the facts that petitioners

[8] The judge's prior ruling during the course of Marshall's appearance on the stand denying petitioners' motion to limit consideration of his testimony to himself (Tr. 4114–4121) affords no basis, in view of the subsequent ruling discussed in the text, for petitioners' contention that they were not permitted to cross-examine Marshall.

[9] See the transcript of the proceedings in the circuit court of appeals on file with the Clerk of this Court.

had not taken the stand in their own behalf and that the Government had spent a great deal of money in investigating and preparing the case. Although petitioners did not give the source of their alleged information, it is clear from the affidavit that they were relying upon the statements of a juror named Williams. Such impeachment of the verdict by a juror is not allowed in the federal courts (*Hyde* v. *United States,* 225 U. S. 347, 384; *Clyde Mattox* v. *United States,* 146 U. S. 140, 148; *Jordon* v. *United States,* 87 F. (2d) 64, 67 (App. D. C.), certiorari denied, 303 U. S. 654; *Davis* v. *United States,* 47 F. (2d) 1071 (C. C. A. 5), certiorari denied, 284 U. S. 646; *Williams* v. *United States,* 3 F. (2d) 933, 936 (C. C. A. 6)).

CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
ROBERT L. STERN,
Special Assistants to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

APRIL 1944.

APPENDIX

CARL BENMAN, Commissions, $25,762.20 (Tr. 2548)

Name	Age	Amount invested	Returns received	Transcript
Mr. Johnson	31	$50.00	$90.00	356 ff.
Mrs. Johnson	66	1,950.00	625.00	370 ff.
Mrs. Miller		750.00	251.00	2063 ff.

HIRAM BERRY and R. C. DECK, Commissions paid to Deck, with whom Berry worked, $23,434.66 (Tr. 2548)

Mrs. McClaskey	55	$1,000.00	$122.82	1192 ff.
Mr. Skinner	84	5,700.00	544.32	226 ff.
Mrs. Linnabury	72	500.00	22.24	15 ff.
Mr. Dutt	79	6,320.00	2,515.29	1080 ff.

E. G. BLUE, Commissions, $6,812.22 (Tr. 2548)

Mrs. Jones	61	$1,100.00	$133.35	286 ff.
Mrs. Berry	74	3,300.00	705.00	2905 ff.
Mrs. Aukerman	56	1,150.00	400.00	1170 ff.
Mr. Buyer	71	1,850.00	(1)	316 ff.

GEORGE F. BUCK, Commissions, $13,655.96 (Tr. 2548)

Mrs. Bain	75	$6,135.[illegible]	$2,134.28	663 ff.
Mrs. Nelson	75	5,800.00	3,493.00	504 ff.
Mrs. Hedge	80	660.00	23.34	563 ff.
Mrs. Winter	73	900.00	00.00	534 ff.
Mr. McOwen	66	6,530.00	2,498.50	2070 ff.
Mr. Daugherty	60	1,250.00	34.00	1990 ff.

WILLIAM N. CLARK, Commissions, $69,461.60 (Tr. 2548)

Mrs. Burwell	69	$7,040.00	$2,597.50	54 ff.
Mrs. Decker	52	ca. 2,500.00	1,113.82	1537 ff.
Miss Williamson	59	15,924.00	4,125.59	2836 ff.
Mrs. Musser	65	18,800.00	6,074.85	2780 ff.
(Promissory note)		11,000.00		
Mrs. Horlocker	55	1,000.00	63.45	2193 ff.
Miss Wells	65	6,950.00	2,506.21	1897 ff.

1 Outright purchase.

WILLARD S. HOLCOMBE, Commissions, $14,870.96 (Tr. 2548)

Name	Age	Amount invested	Returns received	Transcript
Mrs. Stephan	47	$2,500.00	$100.00	2145 ff.
Mr. Price	73	2,308.00	94.48	2259 ff.
Dr. Beery	80	1,000.00	255.70	205 ff.
Mrs. Cook	66	5,000.00	759.94	2175 ff.
Mrs. Midgley	70	7,000.00	495.00	3093 ff.

EARL L. HOLLIDAY, Commissions, $24,244.89 (Tr. 2548)

Mrs. Miller	78	$500.00	$30.00	627 ff.
Mr. and Mrs. Richeson	70 60	1,000.00	00.00	918 ff.
Mrs. Kistler	79	500.00	00.00	3115 ff.

BYRON L. MCCLURE, Commissions $4,025.16 (Tr. 2548)

Mr. Denny	.....	$450.00	$333.00	1369 ff.
Mr. Ford	51	2,000.00	222.22	1232 ff.

A. L. MALOTT, Commissions $20,409.53 (Tr. 2548)

Mrs. Zieg	67	$2,500.00	$1,682.20	328 ff.
Mr. and Mrs. Herring	75	2,000.00	.....	2137 ff. 1282 ff.
Carl Hoffman	56	1,500.00	131.39	1805 ff.
Mrs. Hoffman (deceased)	.....	10,200.00	1,708.62	1816 ff.

W. HAL MARSHALL, Commissions $4,509.25 (Tr. 2548)

Mrs. Fleming	58	$7,000.00	$275.98	2104 ff.
Mr. Jones	64	11,500.00	31.67	2291 ff.
Mrs. Kerr	52	2,125.00	00.00	2273 ff.
Mrs. Roley	83	5,000.00	125.00	6 ff.
Mr. and Mrs. Morrison	50	900.00	00.00	2249 ff.

S. C. NEIDIGH, Commissions $7,481.43 (Tr. 2548)

Mrs. Young	60	$2,750.00	$835.00	2945 ff.
Mrs. Mather	36	400.00	287.00	1751 ff.

EARL PARDEE, Commissions $8,938.52 (Tr. 2548)

Mrs. Lindsey	71	$5,800.00	$426.08	2133 ff.
W. E. Wiley	52	3,000.00	150.00	897 ff.
Mrs. Fishbaugh	82	600.00	33.36	1888 ff.

GEORGE E. REINWALD, Commissions $54,809.64 (Tr. 2549)

Name	Age	Amount invested	Returns received	Transcript
Mrs. Dinkel	70	$7,000.00	$3,115.01	2917 ff.
Miss Feichtner	49	850.00	466.67	1715 ff.
Mrs. Leitzy	51	2,000.00	267.58	3012 ff.
Mrs. Myers	62	1,454.07	00.00	3140 ff.
Mrs. Steineman	72	9,180.00	2,231.31	1671 ff.

DAN S. RIGGLE, Commissions $12,681.00 (Tr. 2549)

Mr. Black	51	$1,000.00	[a] $1,725.00	112 ff.
Mr. and Mrs. Spencer	51	2,200.00	1,037.00	2989 ff.
Mrs. May	75	5,300.00	1,023.60	2184 ff.

[a] Through legal proceedings.

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In the Supreme Court of the United States

OCTOBER TERM 1943.

Nos. 789, 790, 791.

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS.

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INDEX.

Government Argument I..... 5
Government Argument II..... 21

AUTHORITIES CITED.

Cases.

Beavers v. Haubert, 198 U. S., page 954..... 23
County Com'n. v. Shores, 97 U. S. 272..... 14
Dickerson v. U. S., 18 Fed. (2nd) 887..... 15
Durland v. U. S., 161 U. S. 306.....13, 19
Fain v. U. S., 209 Fed. 525..... 16
Hammer v. U. S., 134 Fed. (2nd) 592..... 17
Harrison v. U. S., 200 Fed. 666..... 13
Hawley case, 113 Fed. (2nd) 966..... 12
Leathers case, 135 Fed. (2nd) 507..... 12
Manning v. Mutual Life Insurance Co., 100 U. S. 693.. 16
Pettibone v. U. S., 148 U. S. 197..... 16
Pietz case, 110 Fed. (2nd) 817..... 12
Ponzi case, 280 Fed. 193, 4 Fed. (2nd) 25..... 11
Roper v. U. S. (C. C. A. 10) 54 Fed. (2nd) 845..... 20
Tucker v. U. S., 224 Fed. 833..... 13
U. S. v. Armour, 48 Fed. Sup. 801, Dist. Ct. Okla..... 17
United States v. Beck, 118 Fed. (2) 178.....7, 8, 11, 12
U. S. v. Beggs, 211 U. S. 507..... 16
U. S. v. Schwartzburg, 241 Fed. 348..... 15
Vernon v. U. S. (8 C.) 146 Fed. 121..... 14
Wolf v. U. S., 238 Fed. (4th Cir.) 902..... 20

Text.

22 *Corpus Juris Secundum*, Criminal Law, Para. 467 (b) 3, page 715..... 23

Statute.

U. S. C. A. Title 18, Section 338..... 3

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS.

We desire to reply to the able Brief of the Government because we believe that the arguments therein are based upon false premises and misapprehension of the essential facts and we do not wish to appear by our silence, even, to agree thereto.

The scope of this reply brief—having in mind that this is a petition for certiorari—does not permit of a detailed examination of the testimony as referred to in the notes of the respondent's brief on pp. 10-12.

Petitioners predicated their petition for certiorari on the grounds that the decision of the Court of Appeals—on the record and under the circumstances related by the Court—was in conflict with the applicable decisions of the Supreme Court and the Circuit Court of Appeals and suffered a departure from the established modes of procedure; that the questions presented were of such importance as to call for the revisory and supervisory powers of the Supreme Court; that accused and counsel may know in the

future what principles to rely on where there is no direct proof of guilt but reliance is placed solely on circumstances which are conceded not to be illegal and are conceded to be consistent with innocence. Also the well founded claim that Petitioners were denied a speedy trial and that, that question had not but should be determined by this Court.

The Government in our opinion has evaded that situation. They have endeavored to give it the silent treatment. Why should they not meet that directly?

Petitioners demonstrated conclusively, by references to the record and the applicable decisions of the Supreme Court and the Circuit Courts of Appeals that the *decision of the Circuit Court of Appeals herein, as it affects petitioner-salesmen, is in violent conflict on* important and vital issues and questions determinative of the rights of the accused. The Solicitor General has directly evaded meeting that situation, which is the basis of our Petition for a writ of certiorari.

The case before this Court is not an indictment upon a charge of obtaining money or property by false pretenses or representations,

But of "*devising a scheme to* defraud"—and a conspiracy to carry out that *scheme* with intent to use the mails. Under either charge an agreement must be proved either directly, or by circumstances which do not admit of an inference of innocence. Where a circumstance does admit of an inference of innocence, then the question becomes one of law for the court and not for the jury. The Solicitor General evaded meeting that question, which clearly establishes a conflict between the decision of the Circuit Court of Appeals herein, and the decisions of the Supreme Court and decisions of other Courts of Appeals as well as of the Sixth Circuit Court.

(Emphasis throughout is ours.)

The Federal Courts have held the two offenses must not be confused. One cannot be used as a substitute for the other under Section 338, Title 18, U. S. C. A.

Schwartzburg vs. U. S., 241 Fed. 348:

> *"The scheme to defraud denounced by the statute is a crime wholly different from conspiracy, and not to be confounded with the offense known as obtaining money under false pretenses."*

All of this is indispensable to a consideration of the rights and claims of appellants, and it is highly important that this Court does not lose sight of the essential elements of this case; that a *scheme to defraud* and *an agreement thereon*, must be established as against the individual appellant salesmen; and that *"the presumption of innocence lies at the foundation of our criminal law and attends the accused throughout the trial."*

It is important and indispensable that the court keep in mind

1. That this case relates, to the sale of sections at wholesale to secure money to buy, build and develop cemeteries.

2. To the sale or resale of those sections when developed and improved at retail, to pay a profit to the wholesale investor, or the lender.

3. That these cemeteries were bought and developed costing $424,000.00 exclusive of salesmen commissions, advertising, office expense, legitimate profit to the promoters.

4. That $1,840,582.21 was paid in to Forest Glen, Inc., by investors and lendors.

5. That sections were sold at retail wherewith to pay investors and lendors, aggregating $1,332,880.66.

6. That 14,000 sections had been sold for burial purposes at retail and 33,000 remained to be sold.

7. That $132,043.92 in cash was paid into the endowment funds.

8. The deed to every section whether at wholesale or retail specifically provided that the section could be used only for burying the dead.

9. All the cemeteries at the time of the trial were operating as going concerns, burials were being made and sections for burial purposes at retail were selling at prices ranging from $125.00 to $350.00 and $500.00 a section.

All the foregoing was established as a part of the Government's case.

Those facts are important because the Solicitor General in his brief as did the Court of Appeals, rely upon the proposition and claim that this is a "Ponzi Case." We believe that claim on the part of the Government is unconscionable in view of the admitted and undisputed facts established by the Government on its own case.

These cemeteries are now operating as going concerns, making burials regularly and sections are selling at higher prices for burial spaces than when this whole matter was arrested by attacks from private individuals and the government—while upwards of more than $200,000.00 has been collected since May 18, 1938, from the sale of utility sections, not one dollar of that has gone to investors as contemplated by the original enterprise. It has gone for expenses of litigation, receiver's fees and attorneys fees.

These are facts, some of record, and some not, but we believe this Court should know them and that we have a right to state them. It would be a calamity to send innocent men to prison and then, that it should develop, that in due course of time these investors should all be paid back what they put in and by the very method the Government calls criminal as against these salesmen. There is no one who can say authoritatively they will not or that it is not probable or possible.

GOVERNMENT ARGUMENT I.

From the beginning of this prosecution as against petitioner salesmen, the Government has based its case solely on circumstances. We again find it relying on circumstances in its argument No. 1. These defendants were all implicated in the fraud, contends the Government, and yet the Government in launching the prosecution did not believe that the *Trustees,* the men who had charge of the enterprise for five years, had any knowledge of a fraudulent scheme.[1] If the Government's contention is tenable and circumstances against these defendants are ample to sustain their conviction, where are the men who fostered the plan and carried it along year after year?

If the jury understood the evidence and followed the Court's charge, as the Government contends, on what legal basis was the Auditor for the company acquitted?[2]

If the Government is correct in its contention that the circumstances surrounding the financial operations of the enterprise are sufficient to sustain a charge against these salesmen of using the mails in furtherance of a scheme to defraud, why would not these same circumstances, *coupled with actual knowledge,* be sufficient to at least support indictments against the principals (Trustees). We have here the anomalous situation of the Government contending that those who positively *knew* were innocent, but that *those who did not know,* except by the force of circumstances, were guilty. This unjust conviction of these Petitioners having resulted and the Trial Court's action in allowing the verdict of the jury to stand having been condoned, we submit that a question of general law is before this Court that has been decided in a way that is untenable.

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[1] None of the Trustees were indicted.

[2] The Auditor made and had control of all of the records of the enterprise.

The Government's argument in answer to the Petitioners' contention is based on false premises, viz.:

(1) The investors were paid back out of moneys collected from investors and not from profits.[1]

(2) The salesmen went beyond legitimate selling activities and engaged in a deliberate effort to defraud the aged and the credulous.[2]

Mr. Marshall, the Attorney, the Auditor, and the Trustees were the men responsible for the financial operations under which the development proceeded. There is no substantial evidence that Petitioners knew or had any control over the financial setup. They did know that the parks were being developed and that investors were being paid; they saw the enterprise triple in size under the control of outstanding men in whom they were justified in reposing confidence. On what just rule of law can they be held under all of the circumstances to be answerable under premise No. 1?

An argument based on premise No. 2 fails unless circumstances show that these salesmen had some reason to believe that the investors would not be paid.

The evidence of the Government covers the period from the Fall of 1933 to May of 1938. What has happened to the parks since that time? The company that was declared a bankrupt was a sales organization separate from the three parks. The Government does not contend that the parks are not in existence. It does not contend that the investors do not have valuable constructive holdings therein. These are more than circumstances, they are strong evidence tending to show that the salesmen were justified in having faith in the enterprise.

The salesmen did represent that investors would receive large returns but when we consider that they were

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[1] Brief of Government, page 7.

[2] Brief of Government, pages 14 and 15.

acting under the direction of a Board of Trustees in whom they had every reason to have confidence and upon whose integrity the Government has placed its stamp of approval[1] and that these representations were embodied in the contracts and declared by the Court and admitted by the Government not to be illegal or fraudulent in themselves, can we say that the argument of the Government on premise No. 2 is convincing? There is also this compelling circumstance that seems to have been lost sight of. This enterprise was not short-lived. Its development continued for years and during that time payments were made continuously to investors. There is *no* evidence that investors will not eventually be paid in full.

In all of the respects mentioned the case of Petitioners differs from the case of *United States vs. Beck.*[2] The Circuit Court in the *Beck* case in commenting on the guilt of the principals said "These three boldly conceived and brazenly executed the scheme to fleece the public."

In the *Beck* case there was no question of the fraudulent character of the enterprise.

If there were widespread fraudulent acts committed by these Petitioners, is it conceivable that the Trustees did not hear about such acts? Is it possible that such a scheme to defraud existed under the very noses of these Trustees year after year without their knowledge? Is it believable that a fraudulent financial plan such as the one alleged was not observed by the Auditor Malloy? The answer is that there was no intent to defraud in the minds of any of these men either Trustees, Auditor or salesmen.

They believed in the stability of the enterprise and they still believe in it.

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[1] By not indicting.

[2] 118 Fed. (2) 178.

And their belief was not founded on what they learned from a salesman's kit, as in the *Beck* case,[1] but was founded on the evidences of success of the enterprise that were before them in abundance.

Had these Petitioners been given a fair trial they would have been acquitted by the jury.

And the Government's position was not strengthened by arguing that the Court charged the jury on circumstantial evidence.[2] Some day this Court will destroy a much abused legal subterfuge by saying that a trial court may not "take away" during the trial and then "give back" in its charge. In this connection, in the name of common sense, how could a jury of laymen understand an elaborate exposition of technical law such as was given at the conclusion of this case? Any amount of legal lecturing upon the part of the Court could not take from the minds of the Jury anything that had transpired over a period of 6½ months.

Much emphasis was and is placed by the Government on the amount of commissions earned by these Petitioners. There is *no* evidence in the record showing that Petitioner Berry received anything. Yet the Government attaches his name to that of Deck with whom he is alleged to have worked in its untiring efforts to see that everyone possible who resisted conviction shall be punished.

This argument in regard to commissions earned is two-edged, however. Only stable prosperous concerns can pay sizeable commissions. May it not be a circumstance, therefore, of solvency upon which the salesmen had a right to rely when they were paid their commissions which they had earned? When we take in consideration the traveling and other expenses of these salesmen and their length of time in earning them, none were exorbitant. At any rate

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[1] Test Harry D. Golby, p. 186, *U. S. v. Beck.*

[2] Government Brief, page 12.

the earning of commissions of fair proportion are certainly not acts of criminality. This evidence is not entitled to the distinction given it. As stated, innocence can as well be inferred from it as guilt.

The tables compiled by the Government in its Brief[1] show amounts invested by investors and returns received. This table does not show the dates when returns began to be paid and when they ceased. They are for this reason misleading. In the case of most investors they were paid until the receivership proceedings in May 1938.

These tables upon which the Government strongly relies show payments in some amounts to practically all of the investors. Though the returns are not the amounts hoped for by the investors, would not the fact that they received payments periodically be evidence of solvency upon which the salesmen had a right to rely?

The Solicitor General labored under the mistaken notion that "most of the investors were old and credulous."

Their own catalogue of the ages of a very few of the investors (pp. 22-24, Gov't Brief) shows that such a claim is exaggerated and unwarranted. The witnesses were 4½ years and more, older, when testifying than when they invested. There is not a scintilla of evidence that the investors as a class, because of their age, were mentally incompetent, dependent or weak. That is an assumption which does violence to the presumption of innocence. No one would dare say that the six or eight men in President Roosevelt's cabinet were incompetent "or credulous" because of being 70 years, or older.

The Government at the trial, the Court of Appeals, and now the Solicitor General (p. 11, note 15, Government Brief) refer to the alleged sale of sections to investors "in an unimproved part of the cemetery." They cite this as one of the false representations.

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[1] Appendix, page 22, *et seq.*

They seem to forget or ignore the fact that the investors were buying sections and paying money for the purpose of developing and building the cemeteries. In the very nature of things their sections would have to be in the unimproved portions. No one could complain about that fact. That fact was never misrepresented. That is consistent with innocence. That illustrates however the character of circumstances and claims upon which the Government relies to convict innocent men, and to justify the affirmance of that conviction.

The Solicitor General, as did the District Attorney below, relies solely on representations and promises embodied in the applications, taken by salesmen, the contracts and deeds executed by Forest Glen, Inc., and by the cemeteries and on a claim of exaggerated statements made by some salesmen, opinions, and in some instances of alleged misrepresentations by individual salesmen to justify the submission of this case to the jury, the conviction and the affirmance of conviction of petitioners.

The Solicitor General says, p. 9:

"Petitioners were all salesmen. * * *"

"The evidence (against petitioners) consisted for the most part of the testimony of persons who had been induced by them to invest money in the enterprise. *This testimony followed a consistent pattern.*"

They say, p. 12:

"Various petitioners did not all make the same misrepresentations, but each made untrue statements, along *the same general line.*"

p. 14:

"*While no one particular fact may in itself be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury * * * that petitioners were all implicated in the fraud.*"

"The untrue representations made by every one of the petitioners, the multifarious contracts, etc., * * * consistent attempts to obtain further investments * * * all warrant the conclusion that these *salesmen went beyond legitimate selling activities and engaged in a deliberate effort to defraud the aged and the credulous.*"

"*The issue of the petitioners' guilt was therefore a question for the jury.*"

Then in support of their position as stated above, the respondent cites several cases, p. 15, Government Brief, 135 Fed. (2nd) 507, 511-512 and others, and states that *U. S. vs. Beck*, 118 Fed. (2nd) 178, discloses "a similar situation" to the instant case, "where the court upheld the convictions of principals and *salesmen, who were engaged in promoting a comparable scheme for the sale of cemetery lots.*"

Every one of those cases discloses a situation and essential facts, exactly opposite to what appears in the record of this case. All of those cases reveal a case similar to the so-called "*Ponzi* case." The Circuit Court of Appeals likewise stated (p. 74, Petitioners' Brief):

"In a sense the project was similar to the scheme of Ponzi familiar to the Courts * * *. The evidence amply sustained the conclusion that the scheme *was fraudulent.*"

All of the cases referred to above were cited by the Government, and the Court of Appeals herein, to identify the "scheme" relied upon herein, to justify the submission of the case to the jury and the conviction and affirmance.

In the *Ponzi* case, 280 Fed. 193, 4 Fed. (2nd) 25, 26, Ponzi represented that he would invest the investors' money in foreign exchange and double their money. He paid back many people, double profits, but he never invested a cent in any foreign exchange.

In the *Beck* case, 18 Fed. (2nd) 178, the entire organization, salesmen and all, were a part of an organization who knew all the facts, were moved from town to town, money was taken from investors on the promise of resale when cemetery was developed, nothing was resold, investors *were paid only* out of their own money. The salesmen knew no lots were developed or sold wherewith to repay investors.

The Court said in that case, p. 186:

> "If the evidence is as consistent with innocence as with guilt no conviction can be had, and * * *
>
> *"If the established facts and inescapable inferences are inconsistent with the accused's profession of innocence it becomes the province of the jury, to weigh the evidence and determine, under proper instructions, dealing with the quantum of evidence of proof—necessary to convict, the guilt or innocence of the accused."*

Only "where the inescapable inference is one of guilt," does it become the province of the jury to weigh the evidence. But where the circumstance is susceptible of an inference of innocence, this cannot be true.

In the *Pietz* case, 110 Fed. (2nd) 817, money was taken for stock under representations of fact as to development, earnings, etc. Dividends were paid solely out of investors' money. *There was no development, there were no earnings*; they never tried to operate, there could be no earnings, and everything they did was unlawful in itself. The defendants were all in the scheme. That was another Ponzi scheme.

In the *Hawley* case, 113 Fed. (2nd) 966.

The defendants organized, owned and operated the scheme. All knew the facts. That was another Ponzi scheme.

In the *Leathers* case, 135 Fed. (2nd) 507.

The defendants devised a scheme to sell oil leases, under promises of development for oil and represented that

oil existed on the land. No development ever took place. No effort was made to carry out contracts. Every one of the defendants knew these facts. There was no oil on the land. Defendants knew that. That was another Ponzi scheme.

All of these cases are predicated on the principle laid down in the *Durland* case, 161 U. S. 306, 313, 314.

> "That they did not try or intend to carry out the contract."

That is the devisors of the scheme—get something for nothing and promote their scheme by paying the earlier investors out of the latter investors' money, never doing anything or intending to do anything to carry out their contracts. In other words, every act and promise is obviously illegal, criminal and fraudulent in itself.

That conclusion is demonstrated by what the Court said in

Tucker vs. U. S., 224 Fed. 833, *Harrison vs. U. S.*, 200 Fed. 666.

> "Where circumstances are relied upon, they should be such as exclude any reasonable hypothesis of innocence."
>
> "* * * *The schemes which have been punished have all smacked of confidence games, of getting something for nothing.*"

Now since it is conceded that circumstances, only, are relied upon to prove an agreement and knowledge of a scheme to defraud and a conspiracy to carry out such scheme, that there is no direct proof of either, or of criminal intent, and

Since it was charged by the trial court, that the sale of these sections was not illegal and that all the papers and documents were not illegal, and

Since the Government attorneys conceded that it was not unlawful or fraudulent to sell these sections for invest-

ment purposes and to sell enough to buy, build and develop the parks and to resell the sections at retail for utility to pay a profit to the investors, and

Since the Court below conceded that some of the circumstances relied upon for conviction and affirmation are not inconsistent with innocence, and

That the sum of $1,840,582.21 was paid in by lenders and investors for development purposes;

That the only agreements which the salesmen concededly knew of as to what Forest Glen, Inc., would do, was to resell sections for utility to secure the money to carry out the contracts with the investors, and

That Forest Glen Inc., did maintain a large force of retail salesmen and sold sections at retail for utility, up to the time of action for alleged receivership, aggregating $1,332,880.66 (p. 2570 T.), and

That $130,000. in cash was paid into the perpetual care funds as promised, and

That salesmen admittedly had nothing to do with devising any plan or scheme, or the banking, correspondence, financing, bookkeeping or operation of any of the cemeteries or Forest Glen, Inc.

Then the question of the application of the Presumption of Innocence to the circumstances, solely relied upon, does become a question of law. The Solicitor General did not meet that question.

> "Where a circumstance can be reconciled with innocence, *the law requires the theory of innocence be adopted.*"
>
> *Vernon vs. U. S.* (8 C.) 146 Fed. 121, 123, 124.

> "Where only one conclusion can be drawn from the evidence, *the question is one of law,* and a verdict must be directed."
>
> *County Com'n. vs. Shores,* 97 U. S. 272.

"If the intent is not proved by direct evidence then it cannot be inferred from circumstances beyond a reasonable doubt which are consistent with innocence."

U. S. vs. Schwartzburg, 241 Fed. 348.

The presumption of innocence in the instant case required a verdict to be directed at end of Government's case.

"Whenever a circumstance relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value; even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy—to violate a criminal statute, the evidence must disclose something further than participating in the offense, which is the object of the conspiracy. There must be proof of the unlawful agreement either express or implied, and participation with knowledge of the agreement."

Dickerson vs. U. S., 18 Fed. (2nd) 887, 893.

Obviously, participation itself does not warrant an implication of that agreement. *"Where a circumstance is susceptible of an inference of innocence, that circumstance is robbed of all probative value"* and cannot, contrary to the ruling of the Trial Judge herein, be used by the jury for consideration in determining whether defendant is guilty or innocent. The trial court stated in the motion for directed verdict that the jury might draw an inference of guilt. He said the most favorable construction must be given in favor of the government. But the presumption of innocence never deserts the defendant (p. 3380 T., p. 50 Petitioners' Brief; p. 2821 T., p. 61 Petitioners' Brief).

It certainly does not warrant an implied unlawful agreement where the acts done and circumstances, such as these sales—were conceded to be lawful and not unlawful or fraudulent or criminal in themselves.

Since what the salesmen Petitioners did do, was not made criminal or unlawful by any statute, and since what they did do—was lawful and not fraudulent under the charge of the trial court, and the admission of the District Attorney at trial, where are the unlawful means which constitute the scheme to defraud and the conspiracy so far as the salesmen are concerned, of which they had knowledge, which is necessary under the decisions of the Supreme Court and the Circuit Court of Appeals, these all being circumstances, and under the presumption of innocence, which attends the accused throughout the trial? Agreement, knowledge, criminal intent, cannot be inferred from what the salesmen did in this case because that would be basing a presumption on a presumption, an inference from an inference.

There is no direct connection between what the salesmen did which was legal and not fraudulent or criminal and the alleged unlawful agreement, criminal intent or knowledge. See 211 U. S. 507, 517; 209 Fed. 525, 531; p. 54 Petitioners' Brief; 148 U. S. 197, 202, 210; p. 51 Petitioners' Brief; 100 U. S. 693, 697; p. 44 Petitioners' Brief.

The Solicitor General said:

> "Petitioners do not argue that the evidence was insufficient to establish a scheme to defraud or a conspiracy."

Petitioners did not argue that matter, because Marshall was on the stand and the *Court of Appeals found that he alone devised any alleged scheme to defraud and whatever conspiracy existed, and therefore,* on the record—under the Court of Appeals Decision, if it existed, it existed in his mind. The salesmen knew nothing of it. *Nothing can be pointed to, to show that they knew, that he did not intend to or could not carry out these contracts,* or that any profits were paid out of their own money.

It will be noted that the Solicitor General speaks about "consistent attempts to obtain further investments

after a few payments had been made on prior contracts, that "the testimony followed a consistent pattern, * * * made untrue statements along the same general lines."

If that is what the Government and the Circuit Court of Appeals is relying upon, the things which the salesmen did "along the same general lines," then that can refer only to what was embodied and incorporated in the applications, contracts and documents embracing the plans of purchase and resale and payments, all of which was declared by the trial court not to be illegal or fraudulent in itself.

The Solicitor General further states,

> "The petitioners were all implicated in the fraud and no particular fact can be regarded as establishing conclusively the guilt of any particular salesman, but the *composite picture* amply supports the conclusions of the jury."

Mere uniformity of action, as contended by the Solicitor General, does not create an agreement under this statute or under the conspiracy statute. There must be proof of an agreement to do an unlawful act, or a lawful act in an unlawful way (*U. S. vs. Armour*, 48 Fed. Sup. 801, Dist. Ct. Okla.). *Hammer vs. U. S.*, 134 Fed. (2nd) 592, and participation does not prove an agreement or knowledge, see p. 15 Petition herein, p. 58 Petitioners' Brief.

No act that was done by any of the salesmen, as alleged; no circumstance proved—is made criminal or illegal by any statute. Not only that but the Trial Court charged, and the Government admitted that the "consistent acts" which form "the composite picture" as stated by the Solicitor General, were not illegal or fraudulent in themselves.

The Government at the trial claimed that the fraud or vice was that they sold more sections for investment than was necessary, to buy, build and develop, the cemeteries and that when *Marshall* first started, he paid money to investors in a few instances out of money paid in by other

investors. How would any salesman know that? How would any salesmen, who came in long after that transaction, when everything was developed, and apparently successful—how would they know most of the salesmen came in long after that incident?

Then the Court of Appeals said the scheme to defraud and conspiracy consisted in selling sections for investment.

Obviously selling sections for investment was not made fraudulent by any statute and could not in itself be a scheme to defraud. There must be unlawful means, constituting a scheme of which the salesmen had knowledge.

Now the Solicitor General does not state what the "scheme to defraud" or conspiracy consisted of. Neither did the Court of Appeals, except the Court called it a Ponzi Scheme. He merely says, that the salesmen negotiated contracts by false statements and promises, that they all followed a consistent plan, and participated in the fraud and what they all did forms "a composite picture." He does not however, state what that scheme to defraud was as it affected the salesmen. He merely says that they were implicated in the fraud.

What is the end toward which the salesmen all worked? It can be only this.

They were interested in selling sections to investors upon the terms and according to the plans not prohibited or made criminal by any statute on terms prescribed by Marshall and Forest Glen, Inc.

That is, Forest Glen, Inc., sold sections to investors and agreed to resell the sections for burial purposes at increased prices so as to pay a profit to the investor. Now all of this could only form a scheme to defraud and conspiracy providing that when the scheme was devised, there was no intention to carry it out.

In the early years, sections in the Marion Cemetery and a few in Springfield, contained agreements to sell the

sections so as to enable the investor to double his money. Then later this was reduced, at the suggestion of the Department of Commerce, of Ohio, Mr. Benesch, Director, to 50% and 25% and 20%. The allocation plan was approved by the State Division of Securities. In some instances Forest Glen, Inc., agreed to pay substantial interest. The contracts for reselling did not specify any definite time, but Forest Glen, Inc., did agree to keep a retail sales force to carry out that contract.

Some very pertinent observations on this matter are set forth in the Supplemental Reply Brief of Holcombe herein, which Petitioners adopt.

Now the Court and Government said at the trial that none of those things were illegal or fraudulent in this case.

So far as anything related by the Court of Appeals or by the Solicitor General appears, and so far as any circumstance or testimony adduced by the Government appears that was "the consistent pattern," which the Solicitor General contends, was followed, in inducing the investors to put money into the enterprise.

Therefore, if all that is not illegal, fraudulent, or criminal by statute, if the promises and the sales and documents are not illegal, if participation in doing something which aids in the furtherance of a fraudulent scheme or conspiracy to carry out a fraudulent scheme does not import an agreement in either case, or an intent to commit a criminal offense, then the scheme to defraud and the conspiracy could consist only of an intent not to carry out the contract as stated in the *Durland* case.

But Forest Glen, Inc., did buy the land; it did build the parks as agreed upon; it did maintain a large retail sales department; it did sell sections at retail aggregating $1,132,000 to carry out the wholesale contracts; it did put $130,000 into the endowment funds as agreed upon.

Since Forest Glen, Inc., was planning and managing every act to carry out the contracts made through the

wholesale salesmen, and since it is admitted that the salesmen had nothing to do with the management or operation of the companies, such as the banking, financing, bookkeeping, correspondence, where is the proof of a fraudulent scheme, or conspiracy so far as the salesmen are concerned. Where is the circumstance from which an agreement or knowledge of such agreement, or scheme can be inferred under the presumption of innocence? Why did not the Solicitor General point that out? The only reason is, in fairness and justice —it does not exist. The mere failure to carry out a contract is not fraud and does not warrant an inference of an agreement to devise a scheme or conspiracy. There must be proof "of an intent not to carry out the contract." This is a criminal case and we contend that no court, under the decisions of the United States Supreme Court and of the Circuit Court of Appeals, under the circumstances related herein against the salesmen, under the paramount-controlling principle of the presumption of innocence which attends the accused throughout the trial and the review in the appellate court, and no court would be authorized in saying that the salesmen knew or must have known that any alleged profits were paid out of investors' money, or were being paid back their own money, or that they must have known, that Marshall did not intend to carry out these contracts. See *Roper vs. U. S.* (C. C. A. 10) 54 Fed. (2nd) 845; *Wolf vs. U. S.*, 238 Fed. (4th Cir.) 902, 906.

Since the salesmen all followed "a consistent pattern" in making sales and "no particular fact can be regarded as establishing the guilt of any salesman," then it must be true that the only consistent pattern followed by the salesmen was the making of sales according to the terms of the applications, contracts, documents and deeds which the Trial Court and the Government said were not illegal or fraudulent and which the Director of Commerce of the State of Ohio approved. If that be true, then the claim that these salesmen made false representations according to any

plan cannot be true. The presumption of innocence protects them in that. The trial court said that their acts were consistent with innocence (P. 2821 T.)

Neither Clark nor Pardee had anything to do with the operation, or any of the administrative affairs of Forest Glen, Inc.,—both invested large sums in sections at wholesale, as any other investor and on the same terms. Pardee put in practically all he had. Clark and his family put in almost $60,000.00. Robert Marshall, Inc., was a selling organization organized to sell at retail to aid in carrying out the wholesale contracts. This does not import knowledge of a scheme or of conspiracy or an agreement, as to either. All this is consistent with innocence.

The Court of Appeals reversed the convictions of five. About nine died before and after trial—we believe from worry. We mention this because the Solicitor General referred to it.

Now, if all salesmen followed the "same general line" and the same "pattern" as stated by the Solicitor General, which means they all sold on the same general terms, same contracts etc., then what justification is there for freeing part of the salesmen and convicting the balance?

GOVERNMENT ARGUMENT II.

The Petitioners were deprived of their right not only to a *speedy* trial but they were not given a *fair* trial. The defendants were indicted in November 1940. In March of 1941 the Court called the defendants and their counsel to Dayton, Ohio to set the date of trial. Counsel for Attorney and Auditor demanded that the trial proceed at once. The Government did not wish to proceed. Some of counsel for defendants had previously filed motions for a continuance. The Court then announced that the case would be continued on the motion of the defendants requesting same. It was plain from what transpired that the Government needed additional time to prepare its case.

The Government then had from March 1941 to September 1941 in which to further prepare for trial. When the actual trial proceedings commenced in September 1941 the Court then fixed the hours of trial at four hours a day so that the Government could use the afternoons in going over the case with witnesses who would testify the succeeding day. The shortened sessions should not have been permitted by the trial court. His was the responsibility of protecting the rights of these defendants. He knew that the defendants were compelled to drive long distances each day to attend Court and that they were men of limited means and resources, yet he set trial time at four hours per day.

Not only did the Court sanction the shortened sessions but he permitted the Government to drag the case along day after day. This continued right to the end of the trial in spite of the objections of counsel for Petitioners. But says the Government, the trial court stated that when the defense presented its case it could have any hours desired. This looks like a magnanimous gesture on the part of the Court but it really meant that the defense could rush as fast as it desired when its turn came.

If the Government found it difficult to make a case it was because there was no case to be made, not because of the complexity of the acts of Petitioners. "Undoubtedly a defendant is entitled to a speedy trial" said Mr. Justice McKenna.[1] "A speedy trial is in general one had as soon as the prosecution with reasonable diligence can prepare it; trial according to fixed rules free from capricious and oppressive delays; but the time within which it must be had to satisfy the guaranty depends on the circumstances."[2] The methods used by the Government as pointed out in the Brief of Petitioners could have had but one effect on the jurors—that of making them feel that if the Government

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[1] Beavers vs. *Haubert*, 198 U. S., page 954.

[2] Criminal Law, 22 *Corpus Juris Secundum*, Para. 467 (b) 3, page 715.

took so much time and read so many documents that this was all a showing of unlawful conduct of the Petitioners. In spite of the long delay it is a significant fact that though these Petitioners were put to a terrific hardship to attend the sessions of Court and by pleading guilty most of them no doubt could have secured probation,[1] that not one of them pleaded guilty. They have stood solidly together believing steadfastly in their innocence and still having faith in the justice of their cause. The record shows that they were deprived of a fair trial and were unjustly convicted.

To counsel's knowledge, this Court has not defined the words "speedy trial" as the question of its definition arises in this case. The facts here require that the words be defined that the ends of justice may be preserved.

We repeat the decision of the Court of Appeals is in conflict with the applicable decisions of the Supreme Court and of the Circuit Court of Appeals, and has suffered a departure from the established modes of procedure and the questions presented are important to an accused—and especially to all salesmen, where conviction is relied upon circumstances exclusively, which are obviously and admittedly not inconsistent with innocence which are not illegal, or criminal, or fraudulent in themselves or by statute.

Respectfully submitted,

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[1] All Defendants who pleaded guilty were placed on probation.

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In the Supreme Court of the United States

Nos. 789-791.

OCTOBER TERM, 1943.

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WILLIAM N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL REPLY BRIEF ON BEHALF OF THE PETITIONER, WILLARD S. HOLCOMBE.

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INDEX.

Did Holcombe Knowingly Promote a Fraudulent Scheme? 7

Authorities Cited.

People vs. Moor, 155 Ill. 393, 397-398..... 11

State vs. Lull, 48 Vt. 581, 587..... 11

Wharton on Criminal Evidence, Vol. 1, page 734, Section 485 11

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Respondent.

ADDITIONAL AND SUPPLEMENTAL REPLY BRIEF ON BEHALF OF THE PETITIONER, WILLARD S. HOLCOMBE.

In filing this additional and supplemental brief on behalf of the defendant, Willard S. Holcombe, we wish to explain at the outset that on behalf of Mr. Holcombe we concur in everything that has been stated in the opening brief which was filed on behalf of a number of defendants, and we also concur in everything that has been said in the reply brief on behalf of the same defendants. We file this separate brief because we represent only Mr. Holcombe, and while we concur in all that has been argued both legal and factual on behalf of the numerous petitioners for certiorari, there are special facts which Mr. Holcombe is entitled to have urged in his behalf. Mr. Holcombe was a salesman who was engaged in making sales of cemetery lots for investment purposes. He was a successful salesman and made sales to many persons, no less than twenty-four.

Before entering upon this employment, he made what he believed to be a thorough investigation of the project and interviewed the Prosecuting Attorney of Franklin County, who made a thorough investigation as an official, and was told by the Prosecuting Attorney that he had found nothing illegal in the cemetery project. He only entered upon this employment after having received that advice and assurance.

All those matters are set forth in the opening brief and are referred to briefly in the joint reply brief and will not therefore be again discussed in this additional brief. Broadly stated it is our contention upon the facts that there is not an iota, not a scintilla of evidence adduced against the defendant Holcombe which even tends to prove

(a) That he did at any time make any false representation of fact as an inducement to make sales,

(b) That he had any part in promoting or had knowledge of a conspiracy to use the mails for purposes of defrauding, and

(c) That he had any knowledge of any scheme or purpose to defraud.

We refer to the opening statement of the District Attorney to the jury found at page A of the transcript as follows:

> "The Post Office inspectors have worked upon this case for at least two years, and we of the District Attorney's Office for more than a year."

We do not know how many inspectors were employed but the statement uses the word in the plural and it therefore conclusively follows that there were several, and surely during that period of two years, the court may safely assume that, which the fact really is, that the inspectors interviewed every person to whom Mr. Holcombe had made sales. *Out of this large number (twenty-four), they produced only four witnesses*, leaving it open to the irresistible inference that all who were not produced at the trial would

have testified favorably to Mr. Holcombe. It cannot be argued that only a few were called in the interest of time because the government was willing to devote more than six months of time to this jury trial after having already devoted one year of time of the attorneys in its preparation.

While the government has cited the testimony of only four witnesses, there was one other witness whose testimony is not cited. It is the testimony of Dr. J. E. Beery found at pages 205, *et seq.* His testimony shows that Holcombe had negotiated a loan from Dr. Berry in favor of Glen Rest Inc., giving a deed for cemetery sections as collateral. The loan was to be repaid in installments and these installments were met (somewhat irregularly) until the enterprise became involved in litigation. It is easily understood why in this brief Dr. Beery's testimony was not cited. No misrepresentations were at any time made by Holcombe, and in fact all the stipulations of the contract were met until ill-advised litigation prevented final performance. At page 208 Dr. Berry testified that he had advised with one Mr. Wildermuth and at pages 213 to 217 he testified that he made the loan after consulting, at Holcombe's insistence, with Mr. Benesch, then the State Director of Commerce, now holding a prominent official position in the Office of Price Administration. Finally the court asked him what induced him to enter into the contract. His answer was:

> *"Partly what Mr. Benesch said, and partly what I got from Mr. Wildermuth."*

In our opening brief, we challenged the government to point out in this voluminous record those pages and exhibits, if any, which might contain evidence even tending to show any of the elements necessary to be proven to justify a verdict of guilt against the defendant Holcombe. The government has attempted to meet this challenge by pointing out certain pages and exhibits. We earnestly

request this Court to read those few pages. We think it may fairly be assumed that in pointing out these pages the government has selected every page which will even tend to show the guilt of the defendant Holcombe. The government has carefully refrained from pointing out any pages which they believe would tend to show Holcombe's innocence.

We shall at this time refer to those pages upon which the government bases its claims to show that they do not even tend to show Holcombe's knowledge of a fraudulent scheme or plan or that he was a party to any conspiracy or that he made any misrepresentations of fact to the persons to whom he made sales.

At page 10 of the brief and in Note 7 on that page, the government cites page 3100 of the transcript. This was the testimony of one Mrs. Rennie, who was not an investor. Mrs. Rennie is the sister of one Mrs. Midgley, who was an investor. Mrs. Rennie displayed considerable animus. Everything at page 3100 relates to conversations between Mrs. Rennie and Mr. Holcombe in the absence of Mrs. Midgley, and after Mrs. Midgley had made the investment. The only thing Mrs. Rennie was able to testify concerning conversations with Mr. Holcombe when Mrs. Midgley was present is found at the bottom of page 3098 as follows:

> "Of course, he came and said she would get large interests * * *."

These few words are positively all of the competent evidence of Mrs. Rennie which could have any possible bearing upon representations. If it be assumed that Mrs. Rennie was correct in so testifying and if it be assumed that these words were not put in her mouth by the repeated visits of the inspectors, we insist that it does not constitute a misrepresentation because the trial court charged the jury that there was a difference between mere "puffing" and de-

liberate misrepresentation. This instruction is found in the transcript at page 5328 and is referred to at page 15 of the government's brief on this petition.

Mrs. Rennie was permitted to *testify* at considerable length as *to conversations between her and Holcombe,* away from the presence of her sister, and *after the contract had been made, and these conversations consisted mostly of things she said to Holcombe rather than statements made by Holcombe to her.* To say the least, this incompetent testimony was highly prejudicial.

Again at page 10, the brief states:

> "Prospective investors were told that an investment in the cemetery project was safe and wise."

In Note 8, the government cites against the defendant Holcombe, pages 2145 to 2148. At those pages of the transcript, the witness Sally Stephan was being examined. She became an investor, but a reading of the transcript of those pages will show that her investment was not made upon the representations of Mr. Holcombe at all. *The investor employed her own counsel to make the examination,* and her decision to make the investment was a result of her own attorney's examination.

Furthermore at other pages of the transcript this is more clearly made to appear. At page 2150 Mrs. Stephan testified that her attorney Mr. Mason made the investigation on her behalf, and at page 2151 she stated that she never knew Holcombe before she met him in her attorney's office; that she was interested in the cemetery because her husband was buried there, and that was what led her to take an interest in the first place.

At page 2152 she testified that the contract was dictated by Mr. Mason, her attorney, and she stated again that she had asked Mr. Mason to investigate the cemetery situation.

Other pages corroborate the foregoing and again at page 2155 she testified that Mr. Holcombe had merely done the typewriting at the dictation of her attorney. Finally at page 2155 she testified that she probably knew more about the cemetery than Mr. Holcombe because she had been there quite a lot.

We have only briefly referred to the testimony of Mrs. Stephan, but we earnestly request the Court to read the entire testimony of Mrs. Stephan.

Again at page 11 the government cites page 2263 of the transcript. That page is a part of the testimony of one Mr. Price, an investor. Page 2263 discloses that Mr. Price was influenced by Mr. Wildermuth, another investor. Neither at page 2263, nor at any other page of Mr. Price's testimony do we find any representations by Mr. Holcombe inducing a sale. It is true that at page 2260 Mr. Price, not willing to go to the length of testifying to any representations, did say that Holcombe was only "bragging up" the enterprise. Surely it takes something more than this general statement to be evidence of misrepresentations. Moreover the court charged the jury that "puffing" was not a misrepresentation.

The greater portion of Mr. Price's testimony relates to the fulfillment of his contract and although it appears that the payments were not as prompt as Mr. Price desired, there is nothing to indicate that Mr. Holcombe was in any sense responsible for this.

Pages 2268 to 2272 show that Mr. Price made his investment upon the faith of the representations made by Mr. Wildermuth and one Dr. Clark, and there is nothing in his entire testimony which states any definite representation by Mr. Holcombe which was not absolutely true.

The government also cites pages 2175 to 2178. These pages show the testimony of Mrs. Eldona Cook, an investor. She testified at page 2181:

"I made the investments on all of the contracts on my own investigation absolutely."

She further testified that Mr. Charles Hott, a cousin of hers, first talked cemetery sections to her. We again challenge the government and assert that at no place in the testimony of Mrs. Cook was any misrepresentation made to her by Holcombe.

It will be observed that the government cites pages 2175 to 2178, but they have carefully omitted any reference to page 2181 where she completely exonerated Mr. Holcombe from misrepresentations.

The foregoing four witnesses are positively the only witnesses who were called by the government to testify against Holcombe on the subject of representations, and we earnestly request the Court to read the testimony of those four witnesses.

DID HOLCOMBE KNOWINGLY PROMOTE A FRAUDULENT SCHEME?

At page 11 of the government's brief we find the only statement on this subject relative to Holcombe:

"Frequently returns were paid on the original investment as a means of obtaining more of the customers' money."

Upon this point, the government cites in Note 17, Exhibits 957 A, D, H, J and K. We have heretofore argued that these letters were not properly authenticated and that they should not have been received in evidence without any witness being on the stand at the time they were offered who could have been cross examined. While this objection is well taken, we contend that there is nothing damaging in these letters. The contract between Forest Glen, Inc. and the investors contained the following paragraph:

"Forest Glen, Inc., agrees on its part to maintain a utility sales department in Columbus, Ohio, for the

sale of burial sections in Glen Rest Memorial Estate and to sell or exchange said sections so listed as above or allocate 25% of utility sales of burial sections made by it in Glen Rest Memorial Estate, but this exclusive agreement shall not be construed as an agreement to sell or dispose of said sections at a specific date or time, but only as and when the demand for ultimate sales will bring into the market the aforesaid section or sections."

This was a perfectly fair and absolutely just provision for the benefit of the investors. Forest Glen, Inc., was not only selling large blocks of sections to "investors" but was at the same time selling at retail large numbers of sections for burial purposes.

As a matter of fact, it was shown by the government witnesses that Forest Glen, Inc., had entered into contracts with purchasers of lots for burial purposes, all of which were entirely outside of the sections which had been sold to investors, aggregating $1,332,880.66. (Tr. 2570.)

Manifestly in selling lots for burial purposes only those lots could be sold which were selected by the persons desiring them. It might therefore easily happen that some investors would be so unfortunate as to have deeds for lots which would have a slow sale. Forest Glen, Inc., was selling large number of lots for burial purposes and many of those were in sections which had not been sold to investors and were therefore still owned by Forest Glen, Inc. It was therefore only fair and just that the proceeds from the sales of the lots owned by Forest Glen, Inc., should be allocated among the investors.

Mr. Holcombe was naturally interested in his investors being fairly treated, and in receiving their proper share of such funds. These letters which are introduced as Exhibits 957 A, D, H, J and K are of this purport.

The government is putting an unwarranted interpretation upon those letters and is now seeking to show that in writing those letters Mr. Holcombe was using an unfair

means of obtaining money for his investors which should have been paid to other persons. Exactly the contrary is true. These exhibits were written by Holcombe for the purpose of assuring his investors that the above quoted clause of the contract be faithfully carried out. That clause was in all contracts, and we repeat that that clause is absolutely just and fair. Any other construction on those letters is wholly unwarranted and unfair.

That statement is patently unfair, at page 17 where it is stated that the letters marked as Exhibits 957 A, D, H, J and K were evidence that Holcombe knew "that the practice of re-purchasing some lots was merely a means of inducing further large investments." The letters referred to contained not a syllabus of a suggestion that Holcombe was desiring that Forest Glen, Inc., should repurchase any of the sections sold by him to investors. This statement evidences carelessness of statement on the part of government counsel.

Again at page 17, reference is made to Exhibit 967 C, a letter from Salesman Clark to Robert Marshall. The statement in the government's brief is:

> "In which Clark referred to Holcombe's report to him of an interview of a prospective investor who had agreed to make additional investments if two of her sections were re-purchased."

Again this statement is manifestly unfair. The exhibit referred to contains no such statement. It merely states that one *Mr. Buck* had promised one of *his* investors that two of her sections would be picked up and a check given to her for $150. It has been heretofore argued that that letter was incompetent as against Holcombe and in fact the court so ruled except as to one of the counts of the indictment. Surely if Mr. Buck made such a promise it should have been fulfilled, and it does not charge Holcombe with guilty knowledge because someone else made a promise legal on its face, unknown to Holcombe and he was desiring to have

that promise fulfilled. As a matter of fact there was nothing illegal about the promise unless it was a part of the scheme, and this letter is not competent evidence of Holcombe's knowledge of such a scheme if that was in fact a part of the scheme.

We find at page 16 of the government's brief:

> "Thirty-six defendants were on trial and their individual participation in the scheme could only be shown by the testimony of their victims."

This is a perfectly sound proposition of law and a perfectly sound rule of evidence. We desire to have this principle applied to Mr. Holcombe, and we have pointed out that Mr. Holcombe is in the fortunate position of having not a single one of his alleged "victims" offer any testimony against him of misrepresentations.

We find at page 19 of the government's brief:

> "As the Circuit Court of Appeals stated, no proof was offered that the conversation with the prosecutor influenced Holcombe in accepting the employment."

We think this is a perfectly outrageous argument for the government to make. We beg to inquire by what means proof could have been offered that Holcombe was influenced by his conversation with the Prosecuting Attorney of Franklin County *when the conversations were offered in evidence by Holcombe and rejected by the court.* That testimony was erroneously rejected on the ground that the state law concerning "false pretenses" is different from the Federal law. We have already pointed out that the two laws were practically identical.

The limitations upon this brief do not permit a discussion of the authorities which demonstrate that it was error to exclude the testimony of the Prosecuting Attorney of Franklin County, but we will cite without discussion the following authorities:

Wharton on Criminal Evidence, Vol. 1, page 734, Section 485;
State vs. Lull, 48 Vt. 581, 587;
People vs. Moor, 155 Ill. 393, 397-398.

In the early stages of this six months' trial, government counsel were challenged to make a definite statement as to what was claimed to be illegal about this plan which the government's counsel are pleased to call a scheme. This challenge was repeated at various times during the trial and the record shows that the only answer to those challenges were statements which at best were only glittering generalities. We are therefore privileged to claim that the plan was that which was set forth in the contract. Prior to the time any of these salesmen were employed; to-wit: September 1, 1935, by reason of a request of the Division of Securities and Mr. Benesch, Director of Commerce, this entire plan was submitted to the Division of Securities and approved by the Division. Each salesman was required to take an examination which was a special examination to qualify him to sell cemetery lots. Alfred Benesch was the head of the Department of Commerce and was an outstanding public official for integrity and competence.

All of these matters were developed at pages 3527 to 3532, Tr. Further light is thrown upon the subject at pages 3539 and 3540, Tr. The Court will be interested in reading exactly how the allocation plan operated in practice by reading pages 3540 to 3543 inclusive, Tr. At pages 3873 to 3880, Tr., it is again shown that Mr. Benesch was consulted about changes in the allocation contract which were made from time to time and that those changes were made with his approval.

We confidently assert that there never was any justification for this lengthy and expensive controversy. Except for the fact that the jury rendered a "guilty" verdict, thereby bringing it to a tragic end, we would say that it was "much ado about nothing."

It has been shown at length in the combined reply brief that this enterprise had nothing whatever in common with the so-called "Ponzi" scheme. There is no possible comparison. There were cemeteries; there was a large volume of sales of sections for burial purposes; memorial cemeteries being a new plan as distinguished from those where monuments are erected was becoming popular and the public was flocking to the purchase of sections in memorial cemeteries. It would be difficult for anyone to say that Forest Glen, Inc. was planning the sale of burial sections on a scale which the public would not absorb; there is no showing that salesmen were advised of the extent of the enterprise or that they had any definite knowledge of the entire number of burial sections which were being offered to the public; sections for burial purposes were being sold in large numbers at prices which were sufficient to return to the wholesale investors the price paid for the sections plus the profit of 50 per cent, plus the commissions of the salesmen, plus the improvements to the cemeteries plus the endowment, and plus all other legitimate expenses which were being incurred and which were actually being paid.

The foundation upon which this prosecution is based is that there was a cemetery scheme which would not work; a plan which was destined to failure and which Robert Marshall knew or must have known would fail and which was so patently ephemeral that every salesman who sold sections must also have known that the entire plan was destined to failure. The fact is that none of these things were true. The experience of Forest Glen, Inc., was that the lots did sell at a sufficient profit to do all of the things which were planned. All of this is pointed out in the early pages of the conbined reply brief and will therefore not be repeated here. The cold, plain truth is that this enterprise would have been a success and no one would have suffered any loss and possibly would not have suffered much delay except for the fact that some self-seeking at-

torneys with a view to obtaining fees as receivers and counsel for receivers instituted receivership proceedings, thereby bringing the entire matter to an abrupt halt.

We are well aware that this Court will decide this petition for certiorari upon the record, but we think this Court will be interested in knowing that notwithstanding the receivership proceedings and notwithstanding the subsequent bankruptcy proceeding, and notwithstanding the criminal prosecutions, the sale of these sections has gone forward and sections are being sold on rather large scale by the receivers at prices ranging from $150 to $500 per section, an amount which is amply sufficient to fulfill every obligation of this entire enterprise. Moreover burials are being made regularly in these cemeteries and in spite of all of the difficulties encountered by reason of civil suits and criminal prosecutions, these cemeteries are in a fair way to succeed, and these investors are in a fair way to have their contracts carried out in full.

Respectfully submitted,

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Willard S. Holcombe.

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In the Supreme Court of the United States

OCTOBER TERM 1943.

Nos. 789, 790 and 791.

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your Petitioners, E. G. Blue, William N. Clark, Willard S. Holcombe, Dan S. Riggle, Byron L. McClure, Carl A. Bemman, George F. Buck, Earl Pardee, George E. Reinwald, W. Hal Marshall, A. L. Malott, Earl L. Holliday, S. F. Neidigh, R. C. Deck and Hiram Berry, respectfully submit that they have been aggrieved by the denial of their Petition for Writs of Certiorari by your Honors on May 1, 1944 in the respects hereinafter set forth and pray for a rehearing of said matter.

Very briefly we shall point out how the Court below departed from the principles of fundamental law in allowing this unjust conviction of these Petitioners to stand. We feel it our duty to bring to the attention of your Honors these matters so that there may be no possibility of your Honors having overlooked what we believe to have been a

gross departure from the established safeguards of our criminal jurisprudence.

1. The Federal mail fraud statute when applied to two or more persons is in essence a conspiracy statute. To constitute an offense there must be some common design among the participants in the violation. Those who enter into the common plan must know what they are doing to be guilty of joining in the unlawful scheme. Circumstances when relied upon to show knowledge and to convict must certainly be stronger than the physical facts that exist. Because one is identified with a group of persons in promoting an enterprise is not a circumstance in and of itself that will tie him to a fraudulent scheme. Certainly some evidence must point to the plain fact that he knew of and joined in the plan before his conviction can legally be sustained. The "presumption of innocence always attends him, and lies at the foundation of our criminal law."

How can we determine whether one who is identified with an enterprise that is alleged to be fraudulent has determined upon a course of criminal conduct? Circumstances is, of course, the answer, but if it is our province to determine who of a group have engaged in a criminal course of conduct, we are bound by the rules of law not to look *over* the circumstances that are positive and plain at those which are problematical. Such a "verdict is mere guesswork. *Manning vs. M. L. Ins. Co.*, 100 U. S. 693, 699."

Suppose that two men are seen sitting in a car outside a bank. One man walks into the bank with a gun in his hand. The other remains in the car. A holdup occurs in the bank. Later the man who sat in the car is convicted as an accessory but the man who went into the bank, gun in hand, is not even indicted. Would not the *circumstance* that the man who went into the bank, gun in hand, was not indicted be of such weight as to absolutely destroy the circumstance tending to prove the guilt of the man who re-

mained in the car? Could a Court legally on circumstantial evidence permit the conviction of the man who sat in the car to stand? Does not "the presumption of innocence attend" and protect him? Would not the circumstance that the man who went into the bank, gun in hand, was not indicted be of such overwhelming weight on the question of knowledge on the part of the man in the car that it would be a Court's duty to direct a verdict of not guilty? The trustees of Forest Glen, Inc., were the trustees also of the Parks. They managed and controlled everything. They knew everything. They planned and executed everything. Yet they were exonerated by the Government.

This homely illustration explains the simple point of law upon which we rely. It is so simple and so plain that that may be the reason why it has been overlooked by a Circuit Court and by your Honors. In this connection it must not be overlooked that what the salesmen did in making these sales and executing these documents was charged by the Court and admitted by the Government not to be illegal or fraudulent in themselves.

How can the circumstances in this case be sufficient to sustain the conviction of these salesmen Petitioners when fraudulent knowledge upon their part is one of the essential elements to be proved and when the very men who controlled the parks for 4½ years were not indicted?

The fact that they were not indicted glares up at us from the record. It is undisputed. It destroys the Government's case against these Petitioners. The Trial Court and the Circuit Court failed to notice the effect of this simple fact and we believe that your Honors overlooked its effect in passing on the Petition for Writs of Certiorari.

2. It is undisputed that the three parks are in operation, belong to the lot owners and investors in lots and that they are very valuable; that the record and existing

conditions and physical facts establish the fact and probability that the contracts with the investors were being and will be carried out substantially notwithstanding all this litigation and discouragement. All this can be established on a hearing in this Court. Even the Government witness admitted the records showed "they intended to continue to operate," and necessarily carry out their contracts and not fold up. This conclusion must result under the presumption of innocence. The investors *were* given something for their money. In the usual mail fraud case the investor is given nothing of value. He is deliberately cheated. There is no attempt made in the instant case to justify conviction on such a ground. However, the authorities relied on by the Solicitor General and the Court of Appeals and reasoning of the Circuit Court of Appeals was based upon the cases which disclose only a "Ponzi Scheme." In the instant case the criminality charged is that these Petitioners promised the investors that they would be paid certain sums and that since such amounts were not *all* paid, by May 16, 1938, although not due for 1 to 5 years thereafter as shown by the record, that this justifies a jury in *inferring* that they would never be paid. Such an inference is not based on fact because the parks are there to look at. They contain 33,000 sections to be sold. They are owned by the investors and lot owners. This simple fact seems not to have been considered and we earnestly and respectfully call it to the attention of your Honors.

There is a real conflict between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court and the Circuit Courts of Appeals on the same question.

3. The indictment against petitioner salesmen must be proved as alleged. It cannot be assumed that the trial proceeded on a different theory. Acts done to effect the object

of the alleged conspiracy cannot be used to prove the conspiracy as against the Petitioners.

The indictment (pp. 1-12 R.) alleged directly that the Petitioner salesmen formed a scheme to defraud on or about July 1st, 1933 and formed a conspiracy on or about July 1st, 1933 to carry that scheme into effect by using the mails. The Government did not prove either charge and did not attempt to prove either charge. They do not contend that they proved either charge as against Petitioner salesmen. The convictions cannot be sustained by showing the Government proved something else, which is what they are really contending.

The indictment in this case recited that these petitioner salesmen (pp. 1-12 R.)

> "*unlawfully had devised and intended to devise, a scheme* and artifice *to defraud* and *for obtaining money* and property *by means of false representations.*"

This was not an indictment for merely obtaining money by false representations, *but of using the mails to carry out a scheme* and a conspiracy against the petitioners' government to use the mails to carry out a scheme. This Court has said these must not be confounded.

The Solicitor General stated,

> "*No particular fact may be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury* * * *."

It is conceded that there is no direct proof of the allegations contained in the indictment, that the Petitioner salesmen entered a scheme to defraud and used the mails therefor, or that they entered a conspiracy, as alleged in the indictment.

Yet the Solicitor General contends in effect that the circumstances are sufficient to sustain the conviction of Petitioners and the affirmance by the Circuit Court of

Appeals. The record shows the charge as alleged against the Petitioners was not proved or established, under the presumption of innocence. The Government proved a different situation. They alleged something illegal as against Petitioners. They proved what is admittedly legal. If the indictment cannot be sustained, when the acts alleged are legal (108 U. S. 199), how then can a conviction stand when all that the Government proved was admittedly legal? Contrary to the decisions of this Court the Government relied upon intendment and implication, in the indictment.

We believe this Court has overlooked that what the Government, the Solicitor General and the Circuit Court of Appeals contend as being sufficient to sustain this conviction, cannot on principle and on the undisputed record, be supported or sustained, but is in direct conflict with the decision of the United States Supreme Court in the cases of *U. S. vs. Britton et al.*, 108 U. S. 199-207, p. 205; *Joplin, etc. vs. U. S.*, 236 U. S. 531-549, pp. 535-536; *Pettibone vs. U. S.*, 148 U. S. 197, 202, 210.

4. History is full of instances where prophecies were made of failure of projects which afterwards succeeded. The circumstantial evidence in this case rests very heavily upon the prophecy that the whole park building project would fail. As a matter of fact there never was any place for prophecy in this controversy. This project was proceeding satisfactorily until self seeking attorneys halted everything by receiverships and criminal prosecutions. We repeat what was stated in the closing paragraphs of the separate brief of Holcombe that even in spite of those obstacles, the project will yet fulfill the objects of the founders. The record of this prosecution and the actual, existing facts sustain this claim. We submit that a judgment of conviction such as the one in the instant case should not be permitted to stand when prophecy of what

may happen takes the place of essential, believable, actual facts.

5. One of the most dangerous weapons in the hand of a misguided Prosecutor is control by him of the time taken to present the Government's case. Dragging a case for months might be used to break down all resistance on the part of a defendant. The words "speedy trial" in our Constitution have a plain enough meaning. In a simple mail fraud case such as the instant case, it does not seem possible that the Circuit Court could have considered what was done by the Prosecutor and the Jury in the trial of this case without being aware of the violation of the defendants' rights in regard thereto. In the belief that your Honors may not have considered what is shown by the record even in the instances which we have pointed out in our Brief in support of our Petition for Writs of Certiorari, pages 29, *et seq.*, we respectfully call them to your attention.

6. Your Honors may have overlooked the fact that in a trial lasting 6½ months where certain facts which were not in and of themselves criminal acts, because of constant repetition, might have taken on the semblance of criminal acts in the eyes of the jury. This situation is illustrated by reference to 16 *C. J.*, p. 650, Sec. 1288; 22 *C. J.*, p. 1294, Sec. 757; 124 Iowa 414, 105 N. W. 375.

7. We believe that the *reasons* for the length of this trial of a simple conspiracy case as shown by the record in this case are so important that we would feel derelict in our duty if we would not again call this to the attention of your Honors so that there can be no possibility of them not being considered.

8. What is wrong with our criminal jurisprudence; or, where has the Petitioners' counsel failed, when it becomes

possible for a man such as Willard S. Holcombe to be convicted under such a charge and under the presumption of innocence, and sent to prison, when the record shows that the principals, trustees and managers—the planners and those who executed the plans, outside of Marshall and Jacoby—who were convicted, Jacoby having his sentence suspended, were not indicted but exonerated; when the record shows that all Holcombe did was legal under the charge of the Court and the admission of the District Attorney at the trial, when not a single witness investor testified against him, when there is admittedly no proof whatever that he made any false representations to any investor, pursuant to any scheme to defraud or otherwise; when the forms used in making the sales were approved by the state; when the contracts he did make were being carried out?

We do not know what the situation with reference to the case of *Gerhard et al.* is, just admitted for a hearing, but we note it is a conspiracy case. Those men were apparently trying to undermine the Government in war time. These men were all, in some manner working in behalf of the Government. It may be possible that the reasoning followed and principles applied there will justify a rehearing in this case.

WHEREFORE, and for other reasons appearing in Petitioners' Brief, Petitioners respectfully urge that a rehearing herein may be granted and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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STRELITZ, DOWLER & WIEDEMANN,
Marion, Ohio,
Of Counsel.

We, Matthew L. Bigger, Frank Wiedemann and Carrington T. Marshall, Attorneys, legally admitted to practice in the United States Supreme Court, do certify that in our opinion the foregoing Petition for Rehearing in the cases of E. G. Blue, *et al.*, Wm. N. Clark, *et al.*, Earl Pardee, *et al.*, Nos. 789, 790 and 791, is well founded and is not presented for the purpose of creating a delay.

May ...., 1944.

MATTHEW L. BIGGER,
FRANK WIEDEMANN,
CARRINGTON T. MARSHALL.